CURRENT CRITICISM OF THE ORTHODOX THEORY OF THE STATE

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THE DEVELOPMENT OF THE MODERN STATE.

The conventional hiatus between mediaeval and modern is the bogey which obscurantism has erected to pamper contemporary optimism. It leads to facile deductions based on a narrowed view of history, but makes impossible an adequate understanding of institutional development. The meaning of the modern state cannot be gained by the fixing of an arbitrary date, and the abscission of all that went before. Such an analysis is distressing, for not merely does it engender a blatant certitude permissible only to ecclesiasts, but it furnishes no tool for the appreciation of novelty in social organisation. From this initial error, there develops a staccato methodology which treats events as isolated phenomena, to be related, if at all, by the introduction of an alien force, a supranatural Zeitgeist, a divine clothes-line upon which the garments of civilisation are hung, each by its separate pin. Such a method is static, uninspiring; it makes of history a seismograph recording sudden and inexplicable eruptions in a world already formed. Such a method, finally, tends to codify social relations, to deify established social instituions.

There have been forms of political organisation since Adam surrendered a rib, to be ruled by Eve. Philosophic worthies to the contrary,[1] the family is a form of political grouping, tho it may differ in important characteristics from the modern state. And since the first family, political groupings have grown increasingly in number and in precision, in extent and

1. Jenks, State and Nation, 153. The refusal to recognise inferior groups, such as the family, as partaking of the nature of government, arises from the use of that species of cabinet philosophising to which many writers upon political subjects are addicted. Judging institutions by a priori standards, they may produce a beautiful synthesis, but it is not of this world.

in complexity.

With the barbarian invasions, the ultimate downfall of imperial Rome was assured. The mechanical perfection of the pretorian system had long been little more than a hollow shell, which was decisively punctured by the penetrating vigor of the northern hordes. Their advent decreed not only the dissolution of the Empire; the resultant admixture of races has been of immense political significance. Their reputed emphasis upon individualism suffered in the new environment, but the confusion they brought remained for centuries. And this social disruption demanded, and received, a revision of the instruments of social control. At the base of society obsolete institutions were supplanted by new. Political power became founded upon military strength, social cooperation was largely spontaneous, legal restraint was disseminated. This last development merits especial attention. Whereas the Roman law theoretically was applicable thruout the Empire, the new conditions made such a unity impossible. Each tribe had its own law, crude but compelling; and as each tribe settled down within a limited territory its members were governed by their own law. There followed a multiplicity of jurisdictions, each administering its own code, none subordinate to another. An inevitable conflict of laws arose, which was aggravated with the growth of freedom and ease of communication.

It was under such circumstances that the feudal system formed. That complex of institutions was a result of the attempt to secure order out of chaos, by erecting a series of definite relationships to permeate society in all its phases, to fill up the interstices that a cracked Christendom might regain the semblance of that divine oneness that was the ideal of the time.

The feudal system was based upon land and military prowess. The status

of the serf was fixed by a permanent connection with the land, while the nobles vied on the field of battle for social and political eminence. The scheme, essentially static, worked rather well till improvement in means of communication, the rise of commerce and industry, demanded another revision of society. There was precipitated a struggle between individuals emancipated from the strictures of serfdom, and the avaracious military chieftains. The former wanted freedom, the latter wanted power. To achieve the former, the merchants of the towns and the seaports formed associations, such as the Hanseatic League, by which they found strength to combat the noble. He, in turn, retaliated with a relentless war upon all institutions aiming to disavow the political control of the feudal lord. To destroy the gilds he was obliged to remit many of the old feudal dues of the serf; for to secure obedience from the common man he found it necessary to deal with him as a man, as an individual. By 1200 scutage had been supplanted by a direct tax,[1] which was used to raise armies, to administer justice, and to support the lord in all his splendor. Only so could he combat the heresy of the gilds, which claimed to have a law and an authority of their own, independent of the lord.

The outcome favored the lord; the leagues disappeared or were overthrown, and a new form of political control had come to be.[2] 'Once more, we are compelled to recognise that, as on the downfall of the Roman Empire in the fifth and sixth centuries, so in the resettlement of western Europe in the tenth and eleventh, the military principle was the basis of the State. We must

1. Jenks, Law and Politics in the Middle Ages, 93. This is the best short treatise I have found on this phase of the development of the state. When dealing with history, Jenks does not fall into the errors manifest in his books on political science proper.

2. For a vivid account of this, from the pen of a modern political heretic, see Kropotkin's The State, in Browne, Man or the State?

not yet call it "sovereignty", because that is a much more complex notion, which it took nearly five centuries of history to produce. But we may fairly call it force, or military power, with its essential accompaniments of despotic authority, extreme jealousy of interference from within or without, and its insistence on dealing directly with each individual under its sway, regardless of minor authorities or associations.'[1]

The military principle of rule admitted of no theoretic limits; and, once it became recognised as legitimate, success gave it prestige. From being the weapon of the aristocracy against the rebellious freedman, it became the sword of righteousness to be wielded against those petty nobles who worshipped the dead body of feudalism. The awakening masses rejoiced to see the great princes exterminating the smaller, for it meant the removal of an immediate and now vexatious superior. With the expansion of the power of the great landlords went the release of the people from feudal control. As the local lords were subjugated by the prince, the manor came to exercise less and less actual supervision over its serfs. 'The serf of the early Middle Ages, of the eleventh and twelfth centuries . . . is already nearly a peasant. He is indeed bound in legal theory to the soil upon which he was born. In social practice, all that is required of him is that his family should till its quota of servile land, and that the dues to the lord shall not fail from absence of labor. That duty fulfilled, it is easy and common for members of the serf-class to enter the professions, . . . to become men practically free in the growing industries of the towns. With every passing generation the ancient servile conception of the laborer's status grows more and more dim, and the Courts and the practice of society treat him more and more as a man strictly bound to certain dues and to certain periodical labor within

1. Jenks, State and Nation, 152-3.

his industrial unit, but in all other respects free.'[1]

This expansion of political authority was natural in that it was inherent in the hierarchical feudal system. Given the proper stimulus, the centralising tendency therein was certain to be embodied in institutions. But as long as European society consisted of small self-sufficient localities, the needful impetus was lacking. It was the Crusades, and the development of commerce, that exposed the vanity of the old ideal. When commercial intercourse brutally disregarded the feudal inhibitions, new bonds had to be fashioned for a freshly individuated society. The merchants had formed gilds in plutocratic derision of territorial jurisdictions, but they were defeated by the princes backed by a people inoculated with an affection for land, for stability.

The commercial leagues did not create a lasting form of political organisation, because they ran counter to a popular sentiment. Tho the people of the Middle Ages had inherited from Rome a belief in the mystical unity of society, and tho commerce represented economically a differentiation of function that would achieve such a solidarity, yet the corresponding political structure did not follow. Barriers of race, language, climate, intervened. Such differences 'tended to create and perpetuate differences in habits of life, and consequently, in ideals. The architecture, clothing, and food of one section would have to differ in some respects from those of another; and industries would therefore develop which could supply only a purely local demand and could not function for the whole of Europe. In proportion as these local activities determined by geographical conditions became important, they constituted an obstacle to the formation of a world-empire.'[2]

1. Belloc, The Servile State, 47-8.

2. Forrest, The Development of Western Civilization, 272.

In addition there was the desire for stability. Amid the confusing innovations of the time, popular conservatism wanted to cling to something familiar, powerful, solid. This was found in land, and in the rising organ of authority that was territorially based. 'Every action of Mediaeval Society . . . was directed towards the establishment of a State in which men should be economically free thru the possession of capital and of land.'[1] Such a state the embryonic commercial organ could not become; it was too volatile. 'Economic activities frequently changed their direction very rapidly, while the political structure could be readjusted only gradually. A change in the supply or the demand of a given region might cause a complete dislocation in economic arrangements; but a society must have an organisation which can live thru good times and bad.'[2]

The aggression of the prince had, therefore, popular support. And this support was vouchsafed him because his cause represented the fight for individual freedom. The growth of the prince meant the decay of the manor, the abandonment of the outworn social and economic institutions of the Dark Ages. Moreover, the federalistic movement was urban in source; while what liberation the rural population received came as a dispensation from the prince.

With such encouragement the central authority became expansive, pompous. The jurist-courtiers of the King, as he now came to be called, furnished him sanctions on demand. They gleaned from Roman jurisprudence the doctrine of imperium, that power is its own justification. With this semi-religious weapon, the King pursued the process of eliminating less divine rivals, until his jurisdiction extended to the boundaries of neighboring princes as powerful

1. Belloc, op. cit., 50-1.

2. Forrest, op. cit., 272.

and as truculent as himself; then a balance of convenience was reached, and each was left, within his sphere, to apply the theory of unity long held as the ideal for Europe.[1]

This they did, largely thru the creation of another legal concept, that of dominium. The King was the possessor, the owner, or large tracts of territory, the royal domain. Over these he had absolute control, as an ordinary feudal landlord. His jurisdiction was an appurtenance of the land, and the rights of the residents were entirely subject to his will. From this fact, the conception arose that the King was primarily not the ruler of a people, but the ruler of a definite portion of the earth's surface. He was the ruler of a country, and hence of its inhabitants.

Thence it was but a step to the concept of territorial sovereignty, the present basis of the state. The mere junction of the twin ideas of imperium and dominium was all that was requisite. 'Territorial sovereignty --- the view which connects sovereignty with the possession of a limited portion of the earth's surface --- was distinctly an offshoot . . . of feudalism. This might have been expected a priori, for it was feudalism which for the first time linked personal duties, and by consequence personal rights, to the ownership of land.'[2]

By 1600 'the nation-states are fairly founded, their distinctness and independence established, but their form of government is still a survival from the theocratic time. It is borrowed from the fief. Rulers have the character of landowners; they consider the state they govern as a landed estate which they posess.'[3] But once in the saddle, and endowed with a

1. Forrest, op. cit., 274-85; Jenks, Law and Politics in the Middle Ages,
2. Maine, Ancient Law, 99; Willoughby, Nature of the State, 190.
3. Seeley, Introduction to Political Science, 377; Maine, op. cit., Ch. 4.

necessitarian sanction, the King gives full rein to his passion for power. Dynastic wars extend his territorial jurisdiction to the limit; while the economic developments of the time gave him a very felicitous tool for state-making. Adopting the old idea of unity to the new territorial state, the mercantilists employed a policy designed to form a self-dependent society under centralised control.[1] Internally, the state rapidly widened the scope of its operation and its interference with the daily life of the individual, the subject. Proceeding on the premise that the state was the property of the King, the Sovereign became the dispenser of justice, the raiser of armies, the tax-collector. Other functions were assumed. 'Soon the theory became established, that, where no positive rival claims could be substantiated, the King, as general guardian and administrator of the realm, was entitled to the business. So we get such special subjects of royal management as widows and orphans, Jews, lunatics, and, later on, the printing-press.'[2]

The career of the modern state opened auspiciously. '. . . Conceived, not teleologically, but in a purely naturalistic fashion as a product of needs and interests,'[3] the state could, with some show of truth, pose as the savior

1. Forrest, op. cit., 283-5. 'The existence of the national state being justified, the mercantile policy . . . was both wise and necessary. Nor can it be said that the national policy was any more selfish than the municipal policy had been. It was simply more effective because the sphere to be developed was larger and the power available for coercion greater. . . . The relative economic independence of given areas was the foundation for a peaceful community of great states.' Ibid., 284.

2. Jenks, Law and Politics in the Middle Ages, 91. For further treatment, see Ch. 3. Compare the language of the U.S. Supreme Court, in re Debs, 158 U. S. 564: 'While it is not the province of the government to interfere in any mere matter of private controversy between individuals . . . yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all citizens of securing them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts.'

3. Windelband, History of Philosophy, 426.

of the people.[1] Moreover, it was the contemporary embodiment of the ideal of unity, and thus secured the emotional support of many. Yet it must not be forgotten that force was the basis of the state, that obedience was to be rendered the government only in so far as popular liberty was preserved. The military principle had received authorisation, but its field of operation was limited to the purpose for which it arose.

But the scope of its function was by that very fact elastic; there could be no precise delimitation of its sphere. Conditions change, and with them the need for social control. This absence of apron-strings was aggravated by the logic of the origin of the state. It had come into being thru conflict with rival political institutions, external and internal. Its victorious position was precarious, and demanded constant vigilance, ruthless annihilation of competitors, and concentration of power. 'The authority of the Church had passed away. The State could accept neither the position of subordination assigned to it by Aquinas, nor that of co-ordination suggested by Dante. It had become the only authority.'[2] And this authority 'at all times was keyed up to the pitch of a great emergency. The state was supposed to be the immediate expression of the common weal. The common weal was identified with the security of society and the state. The security of the state dictated the supreme law.'[3]

1. Some writers, notably Burgess, attempt to assign the word democratic to this element of the situation. For instance, he says, 'by the middle of the fifteenth century the actual power of the state had passed . . . to the people,' Political Science and Constitutional Law, vol.1., 93. Cf., ibid., 126, 127. 'Men became enamored of authority . . . . Under the teaching of the Roman legist and the priest, . . . the spirit of free initiative and free agreement was dying out to make room for the spirit of discipline, organisation, and pyrmidal authority. The rich and the poor alike asked for a savior.' Kropotkin, op. cit., 27-8.

2. Forrest, op. cit., 302-3.

3. Croly, Promise of American Life, 221.

Such an attribute of the state found expression in various fields. The duty of pacification was at first fulfilled by the mercenaries of the King; the the Truce of God was supplanted by the Truce of Henry in Germany, of Louis in France. As order came to prevail this function was modified to that of keeping the peace thru the administration of justice. From being judge upon his royal domain, the King became lawgiver for his whole people. As under the feudal system, rights were attached to land, so now they were derived from the Sovereign of the national territorial state. Possessed of the supreme power of execution, his decrees were sancrosanct, even as were the ancient customs. They were expressions of universal reason, and were universally applicable for the safety of the state and of society. 'In the hands of the lawyers this made the legal rights of a Roman landowner into the natural, and hence the legal, rights of sovereign states in their international relations; . . . it made the Roman law of the third century and the English common law of the seventeenth century respectively stand for embodied reason in the rival juristic traditions of the modern world.'[1]

From considering the will of the state as the supreme law, it was but a step, and a logical one, to place the state above the law, for those purposes and activities apparently demanded by salus populi, salus rei publicae. Legal justification was thus given all extensions of governmental surveillance. The theoriciens d'Etat express it thus: 'So far as law is in question, the State is the supreme authority, because the making and administering of law belong by their very essence to the State.'[2] Yet ''the rule of the State extends no further than that of law, because every rule which has the power of compulsion rests upon the foundation of law. But law is in its turn limited, by (a) the

1. Pound, "Juristic Problems of National Progress", in 22 American Journal of Sociology, 722.

2. Bluntschli, The Theory of the State, 305.

necessity of the peaceful co-existence of individuals . . . (b) the existence and development of the nation, to which the private life of individuals is subordinated so far as the security and welfare of the former demand.'[1] This superior sanction for acts of the state, always in behalf of individual or social liberty, rapidly crystallised. 'In France the idea has always flourished that the government . . . possesses, as representing the state, rights and powers as against individuals superior to and independent of the ordinary law of the land. . . . The increase, moreover, in the authority of the central government has at most periods, . . . appeared to most Frenchmen to be the means of removing evils which oppressed the mass of the people.'[2] Similarly, in England, 'there was a notion very prevalent in the Cabinet of Elizabeth . . . that beside the common prerogatives of the English Crown, which were admitted to have legal bounds, there was a kind of paramount sovereignty, which they denominated her "absolute power", incident, as they pretended, to the abstract nature of sovereignty, and arising out of its primary office of preserving the State from destruction.'[3]

With the intensification of social relationships, and with the adoption of the mercantilist policy, the state was formed to contravene the principle of law hitherto prevailing. The expanding state could not be restricted to the function of formulating and expressing pre-existent rules; new regulations must be promulgated. The modern state, established for the needs of the time, had been gathering unto itself manifold functions, and the performance of

1. Bluntschli, op. cit., 305.

2. Dicey, Introduction to the Law of the Constitution, 262.

3. Hallam, quoted in Moore, Act of State in English Law, 5. The language of Fleming, C.B., in Bates' Case, 1606 (2 State Trials, 371) is of like tenor. 'The King's power is two-fold --- ordinary and absolute. His ordinary power is for the profit of particular subjects, . . . it is exercised in ordinary courts. The absolute power . . . is applied for the general benefit of the people, and is salus populi.' Moore, op. cit., 9.

these required novel expressions of the sovereign will. Political authority, arising as a preservative force, had become a directive force, and was tending rapidly to become a self-centered force. Law had become the expression of the right of the state to be,

This apotheosis of the state meant a closer approximation of the interests of the individual and society. This was, indeed, the original justification of the state, that it alone could serve satisfactorily the desires of the individual. And the state had, after a fashion, so served him.[1] But by virtue of the process of its establishment and its continued existence, centralisation had been hypostastised. The nature of the unity wished for was misconceived, or, rather, the unity erected for one purpose insensibly was converted to other ends. The integration of the state had been achieved by cherishing in the hearts of the masses this feeling of solidarity, and the same method was employed to further centralisation of power.

One result was the decadence of local institutions of political administration and authoritative prestige. 'The village . . . is older than the State, and long remained outside its influence. . . . But the State could not afford to allow this gentile organisation to maintain an independent existence. The State . . . perpetuates and extends itself by undertaking new functions. It finds these functions fulfilled, to a greater or less extent, by non-political bodies, the Village, the Hundred, the Shire. It has practically, the choice of two methods. It may seize upon and appropriate the gentile units; or it may create new units of its own.'[2] In either case, local autonomy is gone. 'The State, by its very essence, cannot

1. Forrest, op. cit., 284-5.

2. Jenks, Law and Politics in the Middle Ages, 163-7. England was the only state able successfully to absorb these natural units; France tried to substitute proprietary, and Germany military administration, but both failed, the former becoming a centralised but feudatory state, while the latter degenerated into local war-units.

tolerate free federation; because the latter represents the nightmare of the legist, "the State within the State". . . . The State only deals with subjects. The State alone . . . arrogates to itself the right of being the connecting link between men. Consequently the State must perforce annihilate cities based on direct union between citizens.'[1] And the state was victorious, not solely because of the exercise of brute force, still less because of logical necessity, but also because remnants of expediency clung to the state. 'The triumph of monarchy represents the first introduction of approximately complete unity and order, by the effective subordination of all other authority in the state to the authority of the monarch. . . . As the slow process of civilisation goes on, the need of more perfect order is felt, and the completer repression of the anarchical resistance of powerful individuals or groups has consequently more and more the support of public opinion. The sentiment of national unity grows . . . . Anything that tends to keep up the imperium in imperio within the nation is viewed with aversion and distrust by this patriotic sentiment.'[2] The state, from being an instrument of expediency, had become an institution with a life of its own, and drew to itself an emotional loyalty from its subjects.[3]

1. Kropotkin, op. cit., 31-2. A central supreme power which can adjudicate disputes over rights within localities 'with absolute decisiveness is assumed as essential in the generally accepted theory of the modern state. It is, indeed, implied in the very definition of a political community commonly received.' Sidgwick, Development of European Polity, 324.

2. Sidgwick, op. cit., 325. 'Take any highly civilised state, . . . you can scarcely perceive any relation or affinity between its organisation and that of the families composing it. In modern England or France . . . the family has ceased to have any political importance. So much is this the case that those who, in the seventeenth century, speculated upon the origin of states often show themselves unaware even that in their origin . . . states were connected with families. The very tradition of the connection has been lost.' Seeley, op. cit., 54. Compare the dogmatic dicta of Jenks: 'No fallacy has more confused the study of social history than the sentimental doctrine that the state is an "enlarged family".' State and Nation, 153.

3. Wallas, Human Nature in Politics, acutely analyses this phenomenon.

Yet there remained an individualistic presupposition in all political thinking. The stimulus to state-formation had been individualistic; and, now that the state was stable, opportunity was afforded to examine its achievements for the individual. The philosophers of the state were able so to orientate all of the accrued functions of the state that they appeared as beneficial to personal freedom. The presumption was in their favor. The social contract was an established doctrine. Mercantilism had been hailed as the panacea for the poverty of the people. The King was a benevolent despot. Conspicuous among the accomplishments of the state had been the obliteration of the intermediate groups which had come to hamper individual initiative. So ran the royal apology.

But this very breakdown of local organs of social control had brought into greater prominence the individual; and his self-reliance was increased by happenings in other fields than the political. The Industrial Revolution, the voyages of discovery with the consequent inflation of currency, the Reformation, all tended to heighten individuality. 'The very success of the State had swept away all that bound the individual save the State itself.'[1] Such a development of the consciousness of the worth of the individual must sooner or later conflict with the supremacy of the state. The change in the motivation of social activity from the 'whole' to the particular, which began with the rebirth of commerce centuries before, forced, in a time of social maturity, a revolt against organised coercion. 'The individual was seen to be important to himself; no longer as mere material for political organisation. . . . All institutions came to be regarded as the products of the activities of individuals, having no value save as they served individual ends, that is, contributed to individual happiness.'[2]

1. Forrest, op. cit., 310.

2. Ibid., 313; Windelband, op. cit., 501.

This critical movement culminated in the French Revolution.[1] In essence an unbalanced reaction against the oligarchic exercise of extreme authority in economic and political matters to the detriment of free initiative, it attempted to emancipate the individual from the strictures of institutions. The people in their subliminal consciousness felt that the state had exceeded its power of attorney, that it had perverted its conditioned power, that it had become a mammoth Frankenstein, an end-in-itself. The natural rights of man were asserted against the arbitrary and artificial social structure. The social compact was revived and revised. The people were to rule, for only then could the happiness of the individual be attained.

Yet this movement was the reverse of particularism. The preachments of Rousseau have been generally misunderstood. His perfect individual was not an isolated being, but a social animal surrounded by institutions thru which he could function for the good of himself and of society. For Rousseau, 'the whole social value was in the individual',[2], and revolt was necessary only because existing institutions had become overgrown, until they emasculated the individual, and thus distorted civilisation. Rousseau's individualism 'could not have been given the statement it received had not the individual come into such organic relations with society thru previous development' that he was 'an epitome of society as it then existed.'[3]

This rough identity between the interests of the individual and society

1. The outbreak received its first expression in England, because there the Industrial Revolution started, because the reflex influence of individuated colonies was there greatest, and because it had gained greater social stability than was the case on the continent. The position of Locke is here noteworthy. See for this whole movement, Forrest, op. cit., 309-17.

2. Forrest, op. cit., 315.

3. Ibid., 313.

was at the time formulatee in the doctrine of popular sovereignty. The general will, as expressed by the supreme organ of government, would, from the premise, institutionalise the desires of the individual citizens. The satisfaction of the impulses of men were to be secured thru political action.[1]

Founded on such an hypothesis, the authority and the supremacy of the state remained untouched. Indeed, the state's action was shrouded in a fresh mantle of absolutism. To disobey the state was still a heresy, as militating against the dictates of the individual reason and will. Thus there is no discontinuity in the recent further incursions of the government in the field of social control. 'The collectivistic movement of the nineteenth century, the seeds of which are in Rousseau's individualism, has been based entirely upon the otucome of the previous development.'[2] 'Now the individual had come to realise that all the values of society were focused in him . . . and accordingly he set about appropriating the world about him.'[3] And whether he should do this thru a policy of laissez-faire or thru state regimentation, depended upon principles and social facts extrinsic to the political mechanism. Both were normal methods to procure a common end. And in any case, the state remained the supreme and exclusive agency possessed of coercive power.

Starting with the conception that order was the prerequisite of individual progress, the state has become, thru the logic of the situation and of

1. 'An institution depends on the will or consent of the community for its existence, but yet has a lasting independent life of its own. It is capable of growth and expansion; if national, it may perhaps acquire such a separate power of its own, that law, that even force, cannot easily overthrow it.' Woolsey, Political Science, vol.2., 350. Such an institution the state has become, and Rousseauism, Benthamism, state socialism are allied in their common assumption of the axiom of the general will.

2. Forrest, op. cit., 316, 319-20.

3. Ibid., 318.

its nature, a supreme, unified social organisation, possessed of absolute sovereignty over its own territory and citizens. It has crushed all mediating institutions as atagonistic to this persistent demand for unity and logical consistency. It has undertaken functions of control that formerly were the property of other social agencies, until to-day there is no phase of life to which it cannot extend its power. It has broadened its basis to include the mass of people directly in its framework. Its penetrability has been intensified till no citizen is exempt from political obligation. There exists no right to ignore the state. The state has become an institution, the greatest in the world, and it requires and in large part receives the unthinking loyalty of its subjects. This patriotism is not founded on a reasoned belief that the state still performs the necessary functions for which it arose, but is an habituated emotion exalting the state above the processes of the individual mind. The traditional effectiveness of the state-organ has established an effective tradition under which indolent homage is nonchalantly rendered. Obedience is a matter of torpid faith.

THE ORTHODOX THEORY OF THE STATE

Necessity is the efficient cause of the state. 'The modern state is founded by human means on human nature. The state is an organisation of common life formed and administered by men, and for human ends.'[1] 'The need for the State does not arise out of the institution of property, or out of Capitalism, or out of the class-struggle; it arises because certain jobs want doing, and it is the organisation best suited to do them.'[2] But such an historical explanation of the origin of the state is no justification of the right of the state to be to-day. Thanks to complex institutional changes, the two questions, Why was the state? and, Why is the state? do not admit of an identical answer. The manifold activities of the modern state cannot be justified in a spirit of opaque traditionalism. The state may remain an instrument for some social ideal, but it does not follow that the attributes and the powers given the state remain efficacious in the process of achievement. The mechanism of the political institution must be subjected to a pragmatic test. It is with this orientation that an analysis of the concept of the state must be made, that there may be discovered the logical and human capabilities of the modern state as a living institution.

I. Sovereignty.

'Historically, all modern political philosophy is based on the discovery of sovereignty made in the sixteenth and seventeenth centuries. This would probably be admitted even by those who in recent years have held that the very idea of sovereignty is incompatible with conditions existing in a

1. Bluntschli, op. cit., 57. Cf. Forrest, op. cit., Chs.4, 5.

2. Cole, Labour in the Commonwealth, 185. Cole, of course, reaches very different conclusions from those of Bluntschli. See Laski, Authority in the Modern State, Ch.1.

modern composite state. For most theorists who take a position less extreme, the conception of sovereignty set forth in substance by Bodin and Hobbes underlies the whole theory of the state and is postulated by it.'[1]

The theory was, as has been shown, a product of the confluence of Roman and feudal ideas. The Roman legal theory of imperium, public power, was linked by the mediaeval legists with the feudal idea of dominium, that power went with land as a property right. By a natural process, and under the impulsion of events, this attribute of sovereignty came to be the exclusive possession of the King. Bodin transferred this characteristic of the royal person to the political institution. For him, sovereignty was 'the absolute and perpetual power in the state.'[2] The concept henceforward was an inimitable weapon for the extension of the King's rule. 'In the seventeenth and eighteenth centuries, sovereignty means a right to command placed in the King's hands. It is a right of the same kind as the right of property. The King exerts it just as he exerts his patrimonial rights. Sovereignty is a property; but it is so unified that it cannot either be divided or alienated. Like every other proprietary right, it is, with the exception of certain restrictions derived from the nature of things, an absolute right.'[3] The popular uprisings of this period did not change the concept, nor its position as an inherent attribute of the state. 'All that was necessary was to substitute the nation for the king.'[4] The state's prerogative remained.

1. McIlwain, High Court of Parliament, 373.

2. Duguit, Law in the Modern State, 9. For complete and brilliant treatment, see Ch.1 of this book; also, Gierke, Political Theories of the Middle Age.

3. Duguit, op. cit., 10.

4. Ibid., 11. In France, 'it was fortunately discovered that by a simple verbal change the monarchical theory . . . could be easily reconciled with the teaching of the philosophers and the principles of the American Constitution.' Ibid., 11. In England, 'the parlementarians in opposing the Divine Right of Kings . . . had to employ the theory of the Divine Right of Legislatures, Parliamentary Omnipotence.' McIlwain, op. cit., 350.

In an analysis of the concept of sovereignty, two things must be remembered; the process by which the modern state came into being, and the paternity of the idea of sovereignty. There is, on the part of most political svientists, a tendency to apotheosise unity,[1] a bias of immense potency and of diverse origin. It is sufficient here to note that the prejudice was greatly stimulated by the aggressive and absorptive policy adopted by the embryonic state of the late Middle Ages. To this idea, in itself absolutistic, there must be added the idea of supremacy by inherent right, an idea attached from the start to the concept sovereignty.[2] Rarely is there much attempt to rationalise these principles of unity and supremacy of right. They are ordinarily postulates unquestioned.[3]

Bearing in mind these assumptions, we may attempt an analysis of sovereignty.[4] Garner gives it five characteristics. It is permanent, all-comprehensive, exclusive, absolute, inalienable, and hence, indivisible.[5]

1. 'The inner ground of the origin of the state is the fact that an aggregate of persons have a conscious feeling of its unity, and gives expression to this unity by organising itself.' Jellinek, Die Lehre von dem Staatenverbindungen, 257. 'This essential psychological element of unity must first exist subjectively . . . and then become objective in laws and institutions.' Willoughby, op. cit., 119. 'I have considered the unity of the state as depending solely on the fact that its members obey a common government. And I do not think that any other bond is essentially implied in the definition of a state.' Sidgwick, Elements of Politics, 213. Cf. Laski, Problem of Sovereignty, 1-7, 67.

2. Garner, Introduction to Political Science, 256, 80. 'The one mark which fundamentally distinguishes the state from all other human associations is supremacy of will and action --- the supreme power to command and enforce obedience.' Ibid., 238. Cf. Holland, Jurisprudence, 77; Willoughby, op. cit., 195; Bluntschli, op. cit., 463; Burgess, op. cit., vol.1., 67.

3. The following is typical: 'In reality the summit of real unity is reached in the independent political state. . . . The state, then, may be taken for the supreme society. . . . The state then is the ultimate creator, guardian, and guarantee of all right in this world.' Wallace, Lectures and Essays, 262.

4. Duguit would call this 'the merest dialectic without relation to reality'. Op. cit., 25.

5. Garner, op. cit., 248-56; cf., Burgess, op. cit., vol.1., 52-3.

An elaboration of these attributes should serve to bring into view some of the logical implications involved in the concept.

Sovereignty is permanent. This necessarily follows from the postulate that sovereignty is an inevitable characteristic of the state. Having included in the latter institution the idea of sovereignty, so long as there is an organised political society, there must be sovereignty. Thus sovereignty is as permanent as the state itself.[1] Where the state goes, there goes this power of receiving obedience. Austing has formulated this metaphysical relation in a concrete example. 'In case a given society be torn by intestine war, and in case the conflictong parties be nearly balanced, the given society is in one of two positions. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies.' (I.e., two states each possessed of sovereignty.) 'If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy.'[2]

Sovereignty is all-comprehensive. As an attribute of the state, sovereignty continuously tries to exert itself over more and more elements of human life. We live in a state context; the man without a country is an anomaly unrecognised by the sovereign authority. As the receptacle for the general will the state has no logical bounds. 'Its organisation embraces all persons, natural or legal, and all associations of persons.'[3] 'A man's life . . . is in the main filled by his station in that system of wholes

1. 'Human nature has two sides to it, --- the one universal, the other particular; the one the state, the other the individual. . . . They cannot divest themselves of either.' Burgess, op. cit., vol.1., 52.

2. Brown, Austinian Theory of Law, 99-100.

3. Burgess, op. cit., vol.1., 52.

which the state is.'[1] 'The individual is supposed to see in it the form of life, and more than that, the particular form of sentiment and volition, which his nation has so far worked out for itself, and in which he, the private person, finds the substance of his own mind, and what unites him with others. It includes, of course, the ethical tradition of the society, with the observances and institutions in which it is embodied and preserved; and more especially it is identified with the general will as expressed in the law and the political constitution. The state, in short, is the ark in which the whole treasure of the individual citizen's head and heart is preserved and guarded within a world which may be disorderly and hostile.'[2] 'The task of the State is, therefore, ideally illimitable and infinite.'[3]

Sovereignty is exclusive. This is also a logical deduction from the twin postulates of unity and supremacy of right. Sovereignty qua sovereignty possesses 'that quality in virtue of which there can be but one supreme power in the state, entitled to the obedience of the inhabitants. To hold otherwise would be to deny the principle of the unity and organic nature of the state, and to recognise the possibility of an imperium in imperio.'[4] 'Political science and public law do not recognise the existence of an imperium in imperio. . . . There cannot be two organisations of the state for the same population and within the same territory.'[5] 'The will of the people expressed otherwise than thru legally constituted channels is not

1. Bradley, 'My Station and Its Duties', in Ethical Studies, 157.

2. Bosanquet, 'Patriotism in the Perfect State', in The International Crisis, 133-4.

3. Von Stein, Lehrbuch der Finanz Wissenschaft, 6. In all fairness, it must be said that practical limits are recognised. Cf. Bluntschli, op. cit., 56, 305-6. But the state invariably tries to expand; and these limitations do not affect the logic of the theory; and the theory prides itself as logical.

4. Garner, op. cit., 248.

5. Burgess, op. cit., vol.1., 52.

sovereign any more than the unofficial opinions of the members of a legislative body are law. The sovereignty of the people has a meaning and is entitled to legal recognition only when it is the sovereignty of the people in their legislative or constituent assemblies.'[1] The historical origin of this attribute has already been stated.

Sovereignty is absolute. This is the quality which Austin stresses. It is the quality of compulsion; for him, as for Bentham before him, all law is expressed as a command. 'Every positive law . . . is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. It follows that the power of a monarch . . . is incapable of legal limitation.'[2] 'Power cannot be sovereign if it be limited.'[3] It was from this premise that the lawyers developed in England the doctrine of Matter of State,[4] while in France the state, i.e., its officers, can still plead act de gouvernement for exceeding legal authority.[5] From being in origin the highest practicable instrument for the determination of rights between individuals, the state has assumed legal irresponsibility. The idea is not foreign to us; in 1895 we find Secretary of State Olney saying, 'Today the United States is practically sovereign . . . and its fiat is law upon the subjects to which it confines its interposition.'[6] The American

1. Garner, op. cit., 245.

2. Brown, Austinian Theory of Law, 155.

3. Burgess, op. cit., vol.1., 53.

4. Moore, op. cit., in extenso.

5. Ibid., 97; cf. Dicey's famous chapter on Droit Administratif in France, in his Law of the Constitution.

6. Letter to Ambassador Bayard, in Henderson, American Diplomatic Questions, 427.

theorists are outspoken in its favor.[1] It is, indeed, a logical conclusion from the assumptions entertained. 'Irresponsibility to human judges is claimed for the highest authority in the State, not because it is specially divine, but simply because it is the highest.'[2] '"Obey the authority which has power over you" . . . is a categorical imperative.'[3]

Sovereignty is inalienable. The state cannot conceivably barter away its essence, for then it is, by definition, no longer a state. Moreover, to alienate its sovereignty would be subversive of the teleological principles for which the state exists. Manifest destiny requires possession of this absolute attribute. Finally, the surrender of supreme power to another, if possible, would do no more than to recreate, or rather, to transform, the state; for instantaneously another supreme organ would be established, and would then be the state. 'Anarchy is a permanent impossibility.'[4]

The apparent diffusion of power in the state is easily explained. To the theorist it is not inconsistent with the doctrine of sovereignty that local groups exercise political power. 'All authority is, of course, exercised by permission of the state; e.g., of a father over his family; but it is better here to see only a relation of private life sanctioned by the sovereign, not a delegation of the sovereign power.'[5] 'There is a division by the sovereign itself of governmental powers and a distribution of them among sets of organs, but no division of the will itself. To say otherwise

1. Burgess, op. cit., vol.1., 52-7; Willoughby, op. cit., 192-3.
2. Bluntschli, op. cit., 272.
3. Kant, Philosophy of Law, 256.
4. Burgess, op. cit., vol.1., 52.
5. Holland, op. cit., 77.

is an abuse of the term "sovereignty". Juristically it is just as logical to say that a municipal corporation or a religious society is sovereign within the sphere assigned to it by law.'[1] Thus once again, the dictates of logic demand unity. 'Sovereignty, as thus expressing the supreme will, is necessarily a unity and indivisible.'[2]

II. State and Society.

Sovereignty is therefore that attribute of the state which endows the latter institution with a natural right of power over individuals. 'Sovereignty means the original, supreme, and unlimited power of the state to impose its will upon all persons, associations, and things within its jurisdiction; in short, it is that quality of the state by virtue of which it may command and enforce obedience to the exclusion of all other wills.'[3] The state 'alone has the power of expressing a command, or of determining the validity of an existing rule with such absolute authority that no recourse is admitted to another power, either in search for the authority upon which such order is based, or for the ultimate determination of the wisdom or moral propriety of the actions so ordered. The State is thus supreme not only as giving the ultimate validity to all law, but as itself determining the scope of its own powers, and itself deciding what interests shall be subjected to its regulation. In these particulars the State is distinguished from all other persons and public bodies. In contradistinction to the latter it sets to itself its own rights, and the limits of its own authority.'[4] It follows that the state has, in the eyes of its philosophers,

1. Garner, op. cit., 262-3; cf. Duguit, op. cit., 20-2.

2. Willoughby, op. cit., 195. 'The division of sovereignty paralyses and dissolves a State.' Bluntschli, op. cit., 465.

3. Garner, op. cit., 80.

4. Willoughby, op. cit., 192-3.

legitimised its assumed right of coercion; in a sense, the state is legal;[1] to resist its mandates is a crime, even more heinous than is an illegal action under private law.

But the right to obedience has also a moral basis. The modern state originated in expediency, and its exponents have clung to this notion as a justification for its continued existence. The state is not merely an organ of social control, it is also an instrument for social achievement. It is a teleological institution. This notion, arising as a corrolary from the actual expansion of the functions of the state and from the idea of progress, dominates the modern conception of the state. 'On the one hand the state is a means for the advantage of the individuals who compose it. From another point of view it has an end in itself, and for its sake the individuals are subordinate, and bound to serve it.'[2] According to Bluntschli, theend of the state is 'the development of the national capacities, the perfecting of the national life, and, finally, its completion; provided, of course, that the process of moral and political development shall not be opposed to that of humanity.'[3]

'If the general good which would probably follow submission outweigh the general good which would probably follow resistance, the subjects are religiously bound tp pay it habitual obedience, altho it accomplish imperfectly its proper purpose or end.'[4] The sovereign has, therefore, a prima facie claim to obedience,[5] for only in rare cases can an individual be

1. 'Obligation thru its own will is the legal characteristic of the State.' Jellinek, op. cit., 34.

2. Bluntschli, op. cit., 289.

3. Ibid., 300.

4. Brown, op. cit., 204.

5. Bryce, Studies in Jurisprudence, 544.

certain that disobedience would be of general benefit.[1]

This moral right of the state to obedience rose as the complement of the moral duty of the state to serve its subjects. The doctrine that the state is a necessary evil, that authority is better than anarchy, is of ancient lineage.[2] And the idea that the state should serve the general welfare was an early and cardinal deduction.[3] The divine law of utility, primarily justifying the establishment of the coercive organ, in turn sanctioned its continued functioning for the individual. And as man began to find his economic interests those of society,[4] and as the state mechanism became institutionalised, the latter was called upon to assume, or of its own prerogative assumed, the supervision and supply of agencies of welfare; until at last the state came to represent society, to possess a moral right to control the activities of individual men for the betterment of the social whole. 'As the state is a true and intimate unity, the parts must be subject to the authority of the whole. This is the philosophical basis of the doctrine of sovereignty. The rational will of the community must prevail.'[5]

The state thus came to have a moral right to consider that its interests were the interests of society; that its voice was the voice of the people. Such an idoological development glossed over the authoritarian

1. Bluntschli, op.cit., 476; Willoughby, Social Justice, 248-50.

2. Hobbes is of course the notable example. Cf. Austin: 'Determined by a fear of the evils which would follow a refusal to submit (and, probably, by a general perception of the utility of political government) they freely submit to a government from which they are specially averse.' Brown, op. cit., 203.

3. Gierke, op. cit.

4. Forrest, op. cit.

5. McKechnie, The State and the Individual, 23.

character of the state,[1] and gave it an additional emotional hold over its subjects. The philosophers were quick to seize upon the implications of this doctrine of identity of interests, 'to find, in the interests of the existing political State alone the sole ruling principle in our social evolution.'[2] Kant phrased it thus: 'A union of many for some end is to be found in all social contracts, but a union which is in itself an end is only to be found in a society so far as it constitutes a collective being.'[3] Hegel followed him: 'The State is the realisation of the moral idea. It is the moral spirit as substantial will manifested, and clear to itself, thinking and knowing itself, and accomplishing what it knows, and in so far as it knows it.'[4] Stripped of its metaphysical verbiage, it means that for Hegel 'the State is the highest expression of that social morality (Sittlichkeit) at once precipitated in and enforced by social opinion, which lies behind . . . the life of all other social groups, and behind the life of the political community itself. That social morality is the product of a free will seeking to realise itself in a positive and objective form; and the State . . . is therefore also the product of that will. Produced by that free will, the State sustains it . . . sustains personality, and it teaches personality to transcend itself by giving its devotion to something beyond itself. Thus Hegel is brought to a belief in the divinity of the nation.'[5] In short, the state has come to be more than the state; it is society as well, society possessed of a dynamic purpose.

1. 'While it is true that the state creates rights, and that there are no rights other than those recognised by the state, it is also true that the state ought to be the faithful interpreter of the social sense of right and equity.' [Smith], in Political Science Quarterly, vol.2, 544.

2. Kidd, Western Civilisation, 338.

3. Bluntschli, op. cit., 63, note 7, quoting from Kant's Werke, vol. 7.

4. Ibid., op. cit., 69, quoting from Rechtsphilosophie, sec. 257.

5. Barker, Political Thought from Spencer to To-Day, 27-8.

Such a confusion of course allows the state unlimited legal regulation of life. If the state is the summum bonum of political development, it 'must realise that it is the mortal God, and that in this world it should be ubiquitous and omnipotent.'[1] The state, possessor of the qualities of permanence and exclusiveness, may if it be expedient interfere where is lists, with no legal redress on the part of the individual.[2]

This growth reached its logical culmination in the doctrine of the general will. Originally forged by Rousseau as a weapon of the people against absolute monarchy, this is now employed as the salve to heal the ancient wounds of the strife between liberty and authority. By the simple expedient of erecting this mental image, the treacherous element and the cumbersome machinery involved in the doctrine of popular sovereignty have been avoided, without destroying the doctrine. As Jethro Brown says of theories of sovereignty,[3] so with this doctrine of the general will; it is an apology for a cause; and that cause is the eradication of any lingering possibility of rightful disobedience to the monistic state.[4]

The exposition starts with the 'inward impulse to Society (Staatstrieb)'[5]

1. Wallace, op. cit., 263.

2. This idea is at the basis of both individualistic and socialistic theories, as Kidd has indicated, in speaking of Spencer. 'He really has in view, like the Marxian Socialists, a state of society in which the sphere of law, of morality, and of economic action are necessarily coincident, and in which, in consequence, just as Marx imagined, the requirements of the existing State must, in the end, overrun every domain of human activity.' Op. cit., 90.

3. Brown, op. cit., 272,

4. 'Sovereignty is manifested . . . in the right of the people to determine as they choose the forms of their political existence, and if necessary to change them. . . . This right cannot be conceded to a part of the people . . . but it undoubtedly belongs to the organised nation as a whole. The individual subject may not resist the commands of the nation; . . ..for unless the individual submitted in matters of Public Law, the State could not maintain its unity, its coherence, and its order.' Bluntschli, op. cit., 476.

5. Ibid., 281.

which demands an external organisation for the common sentiments and purposes of men. 'The basis of the State is, therefore, neither contract nor force; but . . . Will.'[1] Hence from the beginning the atomistic origin of the state is denied. 'The origin of the State must be conceived as an act of a People, rather than of individuals. The existence of a common or "General Will" must be predicated and the creation of the State held to be due to its volition.'[2]

'This General Will, as distinguished from the sum of individual wills, is rather a volitional unit that is obtained by abstracting from each of the individual wills certain sentiments and inclinations that concern general interests, and from a combination, equating, and balancing of them obtaining a single result that is based upon elements that exist in the individual wills, but is thus distinct from their sum.'[3] As the precipitant of this solution, therefore, there is found a collective will which is manifested in the state, which in turn is therefore supreme over each and every individual will.[4] The state is 'the realisation of the universal in man, in sovereign organisation over the particular.'[5] It is at once apparent that submission to the state is the highest moral obligation of

1. McKechnie, op. cit., 69. He continues: 'It is thus the Universal Will or practical reason, which is the same in all men while they are true to the principles of the rational nature that makes them men.'

2. Willoughby, Nature of the State, 123. 'This general will exists among a people as naturally as the tendency to union and organisation.' Bluntschli, op. cit., 282.

3. Willoughby, Nature of the State, 124. Cf. Bosanquet, Philosophical Theory of the State, chs. 4-7.

4. 'The will of the people is naturally un-unified, and consequently it is lawless, and its unconditional subjection under a sovereign Will, uniting all particular wills by one law, is a fact which can only originate in the institution of a supreme power, and thus is public right founded.' Kant, op. cit., 258.

5. Burgess, Political Science and Constitutional Law, vol.1., 67.

men, for only thru the state complex can they become really individual. 'In result, modern ethics advocates a subordination of the individual to society as a whole, but does so in such a way as not to abate one whit of his personality or freedom, for this subordination is, in essence, not the subordination of hiw will to a higher social will, but the identification by the individual of the social will with his own will, so that, in obeying the social or political will, the individual obeys his own will purified from selfishness.'[1]

Thus the full circle is completed, and the doctrine of popular sovereignty made safe. The individual is no longer a possible rebel, but an integral part in the sovereign state, which has become a beneficent organism possessed of a moral and harmonious with that of each of its subjects. As the individual is no longer an isolated being, so the state is no longer a mere organised body the sum of its parts, but an organic whole, a self-determined unity.[2] Bluntschli's proviso[3] becomes therefore meaningless, for

1. Willoughby, Social Justice, 251.

2. From this postulate, many theorists give the state a personality. 'The State is a person because it has a will of its own. . . . Personality signifies the capacity for unified, continuous, reasoning volition. . . . Applying these principles to a human community, we find that it is the unity of political groups that gives to the State its attribute of personality, and that it is in this aspect as a person that the State is distinguished from the individuals organised under it.' Willoughby, Nature of the State, op. cit., 134-6. 'While history explains the organic nature of the State, we learn from it at the same time that the State does not stand on the same grade with the lower organisms, but is of a higher kind; we learn that it is a moral and spiritual organism, a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and in realising them in acts. . . . History ascribes to the State a personality which, having spirit and body, possesses and manifests a will of its own.' Bluntschli, op. cit., 21. 'So far as the State appears as a person, so far it has independence, honor, power, supreme authority, unity; in one word, sovereignty.' Ibid., 470. He goes so far as to endow the state with physical properties, and even sex. Ibid., 473, 22-3. Strangely enough, we find Justice Mathews of our Supreme Court using similar language: 'The states are ideal persons --- intangible, invisible, immutable; the state governments are agents, and within the sphere of the agency perfect representations.' Virginia Coupon Cases, 114 U.S., 290.

3. Supra, p. 29.

it is impossible for the state to run counter to the progress of humanity; on the contrary, the state is the highest human institution in which may be found the whole social purpose of man.[1]

III. Liberty and Law.

'Starting from the premise, that in the moral field man is a self-legislative being but yet determined by the idea of a self-perfection, it is possible to harmonise absolutely the ideas of freedom and control, of liberty and law. In so far as the commands of a social or political power are recognised by the individual as being necessary for the realisation of his own best good, which, as we have seen, includes the good of others, such commands no longer appear to him as orders from an external power limiting his freedom, but as imperatives addressed to himself by his own reason. In obeying them, therefore, he obeys, in fact, himself. In theory, then, it is possible to conceive of a society so perfectly organised and administered that at the same time that social subordination and obedience is demanded and obtained, the individuals are left free as being required to do only such acts as their own reason tells them are just.'[2]

Such a reconciliation follws with beautiful logic from the position already reached, that the interests of society and the state are one, that the will of each individual and of the state are identical. The individual 'is coerced by the law, not as a free autonomous person, but as a constituent

1. 'The sovereign authority which uses force must in the ultimate analysis be reduced to the society itself, or rather to the common consciousness of a common end which constitutes the society.' Barker, op. cit., 60. 'By the end of the eighteenth century, the intellectual conception of western liberalism . . . has come to represent simply the theory of the political State.' Kidd, op. cit., 120. Niebuhr defines the state as follows: 'An institution ordained by God, and belonging to the essential nature of mankind, like marriage. . . . But it is an institution which cannot become perfect in this world. The state, as it actually exists, is only a shadow of the divine idea of the State.' Bluntschli, op. cit., 268, note 1.

2. Willoughby, Social Justice, 248.

element of the authority that coerces him. He is an integral and inseparable part of the political body, and his will cannot be separated from its will.'[1]

The supremacy and the intrusiveness of the sovereign body thus achieve a legal status;[2] which becomes easily, to Anglo-Saxon minds, a legitimate status. Law is 'an expression of the general will, affirming an order which will be enforced by the organised might of the state, and directed to the realisation of some real or imagined good.'[3]

Given such a moral sanction for the exercise of power, there is no philosophical necessity for an insistence on the coercive nature of law. If political power is ethically justified, it would seem that further justification would be anti-climactic. Yet inherent in the metaphysical theory of obedience, there lingers a possibility of disobedience; for if the individual, however much he may be etherealised into a whole, is to reason before he obeys, he may, as a matter of fact, disobey. Willoughby does not avoid this difficulty, either by a bald pronunciamento directed to that very same human reason,[4] nor by a blanket sanctification of the actions of the state.[5]

1. Willoughby, Nature of the State, 126.

2. Brown, op. cit., 155. '. . . To allow a Right of resistance to this sovereignty, and to limit its supreme power, is a contradiction; for in that case it would not be the supreme legal power, if it might be resisted, nor could it primarily determine what shall be publicly right or not. This principle is involved a priori in the idea of a political constitution.' Kant, op. cit., 258; cf. Bluntschli, op. cit., 282.

3. Brown, op. cit., 354.

4. He adds to the paragraph quoted supra, p. 35, note 2, the following: 'This does not mean that the individual should feel himself morally bound to obey only those laws which he considers just. . . . In refusing obedience to a law of the State, . . . he must recognise that such laws constitute an integral part of a general system of rights, and therefore that a violation of it will tend . . . to weaken the efficiency of the whole system.' Social Justice, 250.

5. 'The existence of the state is rationally justified because the result of the exercise of its authority is in all cases, as a matter of fact, to preserve freedom rather than to destroy it.' Willoughby, Nature of the State, 126.

The philosophers perforce fall back upon the nature of sovereignty, as they have previously conceived it. 'La loi est le commandement du soverain et elle tire sa force obligatoire de l'autorité dont elle emane.'[1] 'Laws have to be obeyed as between the State and the subject, not because they are reasonable, but because the State has so commanded.'[2] By definition, sovereignty is vested in that 'person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power of either laying down general rules or of issuing isolated rules or commands, whose authority is that of the law itself.'[3] 'Whatever else law is, it is at least command. What makes a particular rule of conduct law, is not the fact that it may be useful, but that behind it is the majesty, the authority, and the force of the State. . . . Of the rules of conduct which are law, the distinguishing characteristic is the existence of the organised force of the community behind them. But what the community . . . will enforce, it may be said with justice to command. Law, in its totality, is the voice of the organised community speaking to all persons subject to its control, and affirming a rule of life which men may accept with the consciousness of the might of the community to support them.'[4]

Relying thus upon the nature of sovereignty, the commands of the state are again given a moral value in which the rights of the individual are determined by the political organ. Emerging from the maze of terminology, the definition of Hobbes remains intact. He says: 'I define civil law in this manner. Civil law is to every subject those rules which the Common-

1. Esmein, Droit Constitutionnel, (4 ed.), 38.

2. Pollock, Science of Politics, 61.

3. Bryce, op. cit., 505. The underscoring is mine.

4. Brown, op. cit., 354.

wealth hath commanded him by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of what is contrary and what is not contrary to the rule.'[1]

Two consequences follow. In the words of Jellinek, 'the rights and duties of individuals receive their potency and authority from grounds set forth in objective law; the State finds the ground for its own rights and duties in itself.'[2]

'Rights belong only to persons, and a person is an individual who subordinates himself to some comprehensive or uniting principle, something which puts them in relation to each other. The right implies a controlling authority on which these persons can fall back, something (at least logically) antecedent to and exclusive of the individual, which makes him more than an individual, by giving him an entry to a sphere in which other individuals also enter. The individual . . . has rights only as a person, i.e., as a member of a society, as embodying in himself, at least partially, the larger aggregate of which he is a unit.'[3] 'The state . . . creates rights, and there are no rights other than those recognised by the state.'[4] 'Thus the individual is a person in the juristic sense only because he has legal rights, and does not have legal rights because he is a person.'[5] This of course is the negation of the tenacious doctrine of natural rights. 'Ideal rights may be conceived which are not in the State; only when they are in it

1. Pollock, op. cit., 60. Cf. Austin: 'A law is a command which obliges a person or persons to a course of conduct.' Brown, op. cit., 17.

2. Jellinek, op. cit., 34.

3. Wallace, op. cit., 258.

4. Smith, in Political Science Quarterly, vol.2., 544.

5. Willoughby, Nature of the State, 158.

do they become real rights.'[1] The state makes the law and demands absolute obedience from all, as a matter of legal obligation.[2]

Yet the state itself has, in one sense, no legal rights.[3] In the strict Austinian manner, the supreme legal organ is legally unlimited, because in every state 'the positive law is a creature of the sovereign.'[4] For Austin, then, the state, having no rights, has no duties, and there remain at best but moral or physical limits to the extension of its prerogatives.

We are no better off if we agree with those theorists who, believing the state to be a person, endow it with rights.[5] For no correlative legal duties are attached to the sovereign; at most there are moral obligations[6] which vary in binding force with the demands of time and circumstance.

1. Barker, op. cit., 60.

2. Smith, op. cit., 544; Paley, Moral and Political Philosophy, 3; Brown, op. cit., 193. 'The truth is . . . that it is the State which causes laws to be obeyed.' Maine, Popular Government, 63.

3. 'A sovereign government . . . has no legal rights (in the proper acceptation of the term) against its own subjects. . . . The rights which are pursued against a sovereign government before its own tribunals, and also the rights which it pursues before tribunals of its own, are merely analogous to legal rights.' Brown, op. cit., 187-90.

4. Ibid., 232. This is the point at which Bryce draws his famous distinction between sovereignty de iure and sovereignty de facto, in opposition to Austin who asserts: 'In respect of positive law, the distinction of sovereign governments into lawful and unlawful is a distinction without a meaning.' Op. cit., 233. Bryce's work has increased our knowledge of the physiology of political power, but its significance has been generally overlooked by the orthodox scientists.

5. 'Right can belong only to a person, and . . . political supremacy only can be ascribed to a political personality.' Bluntschli, op. cit., 470.

6. 'Rule is unquestionably an attribute of the power of the state, but it is not the end of the State. . . . It is rather a duty towards the nation.' Bluntschli, op. cit., 292.

'Liberty in its positive sense may therefore mean the sovereignty of law, as distinct from the sovereignty of individuals.'[1] 'Political or civil liberty id the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects; and . . . since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion.'[2] Obedience to the commands of the state is thus obligatory upon every one; and a society in which such general obedience was not habitual would no longer be a state. Thus once more the state is supreme over all interior associations, and an emotional validity given to its centralising effort. The enactments of the central political power 'assume that the machinery required for enforcement is working in vacuo, steadily, equably, and in a manner capable of overcoming resistance.'[3] 'Their generality and their dependence on the coercive force of a Sovereign are the result of the great territorial area of modern states, of the comminution of the sub-groups which compose them, and above all of the example and influence of the Roman Commonwealth . . . which . . . was distinguished from all other dominations and powers in that it brake up more thoroughly that which it devoured.'[4]

IV. Summary.

The modern state arose under the influence of two concepts; one, that the individual was the final criterion of moral worth; the other, that he was the epitome of social value, and that therefore all men possessed a

1. Ritchie, Principles of State Interference, 85.

2. Brown, op. cit., 175. Austin, of course, is here speaking of England; but his usual confusion of state and government does not vitally affect the principle of penetrability here involved.

3. Bryce, op. cit., 509. 'The law never speaks but to command, nor commands but where it can compel.' Paley, op. cit., 3.

4. Maine, Early History of Institutions, 394.

sentiment of unity. The territorial political state attempted, after a fashion, to satisfy both these ideas, to give individual freedom, to represent the spirit of nationality. But in this process it was hindered by its heritage from Rome; the doctrines of imperium and dominium transformed unity of sentiment into unity of power, an ideal which received, first a pragmatic sanction in the apparent needs of the individual subjects, and then a moral sanction by the identification of their interests with those of society.

So armed, the state proceeded rapidly. To promote individual liberty, centralisation of power was necessary, and this ultimately meant the destruction of all intermediate associations.[1] To express the feeling of unity, now glorified into a Staatszweck, there was needful an ideally illimitable extension of the prerogatives of the state. To this development, theory added the doctrine of the general will, completing the temple that is the state. By means of this, the older, cruder dichotomy between the people as individuals, and the people as political atoms,[2] was transmuted into a harmony. 'The group soul, so far from detracting from the soul of the individuals who enter into it, is itself an enhancement of their souls. It is not an individual absorbing their wills and individualities; it is an additional means of expression for them.'[3] All philosophical objections hitherto available against the sovereignty of the state, with its postulates of supremacy, inalienability, indivisibility, omnipresence, and exclusiveness, are thus displaced by an idolatrous metaphysics. By a peculiar conception of human nature, the state 'came to be believed in as the generating force

1. 'So jealous was it for the independence of the individual that, for fear of compromising this, it was anxious to suppress all intermediate bodies, and to render it impossible that hey should ever be reconstructed. In this it was acting against its ideal; it was weakening human personality in the very attempt to strengthen it.' Leroy-Beaulieu, The Modern State, 11.

2. Woolsey, op. cit., vol.1., 206.

3. Cole, op. cit., 37.

which should fashion society according to a certain ideal.'[1] It is the source and support of individual liberty; and as the state extends its organisation and its jurisdiction, so declines the 'barbarism of individualism', the old anarchic individualism fostered by the contract theory.[2]

'Of course the state may abuse its unlimited power over the individual, but this is never to be presumed. It is the human organ least likely to do wrong, and, therefore, we must hold to the principle that the state can do no wrong.'[3] There may be defects in its organisation, but they are to be countenanced with composure and servility; for to the degree in which it is a state, it represents the sovereignty of the general will, and is therefore infallible.[4] Supreme physical force is apotheosised by its inevitably beneficent operation. 'If we challenge the State, we must challenge it in fear and trembling.'[5]

1. Leroy-Beaulieu, op. cit., 15. 'So far as morally defensible, the State is an embodiment of the rationally transfigured or universalised egoism, and exists to make it effective.' Platt, 'State, Sovereignty, Government', in Political Science Quarterly, vol.10., 301.

2. Burgess, Political Science and Constitutional Law, vol.1., 52-6.

3. Ibid., 56-7.

4. Ibid., 55. Cf. Willoughby: 'The test of good government is the facility it affords for the formulation of an enlightened and intelligent General Will, and the nearness with which its action harmonises with such will when formulated.' Nature of the State, 141.

5. Barker, op. cit., 60.

Chapter III.

THE ATTACK ON THE MODERN STATE.

A. Methodology.

There are two legitimate methods of social investigation, and only two. The one starts from a perception of perverted institutions, and leads to a consideration of the purpose of the social mechanism; it is an attempt to analyse the nature of the social order with the view of establishing a theory of values thru which to guage the efficacy of existing institutions, and by which standard modifications may be made. This method is teleological; it is social philosophy, a branch of ethics applying to the political life of men. The other method is that of science, an investigation of social facts and their history in past institutions, in an attempt to discover the laws of cause and effect which are deemed to operate in society. From such a basis a prognosis of institutional development may be hazarded.

'What is essential for social investigation, whether it starts with the philosophic or scientific interest, is that in putting any question it should know precisely what that question is; specifically, whether it is a question of what is desirable, of what ought to be; or a question of what has been, is, or probably will be. These two questions, tho necessarily related, are none the less necessarily distinct, and to confuse them is the standing temptation of the social inquirer.'[1] To employ, in reasoning on the nature of society, a hybrid of these is moral paralysis and fatal to intellectual integrity.[2]

1. Hobhouse, Metaphysical Theory of the State, 15.

2. The mechanistic view of society, which, from an analysis of existent institutions, postulates an inevitable trend of events, is the familiar basis of many reform movements, e.g., Marxian socialism. It is the result of projecting into the future deductions based on an analysis of current fact, thus establishing in theory a fatalism which they then endeavor to objectify by the perversion or elimination of discordant elements which arise with the progress of time. It is a confusion of the possible with the desirable.

1. Of the Orthodox School.

Yet this is the mistake made by many orthodox political scientists. The majority of them are not scientific reformers, but political moralists or philosophers. Their interest is not modification but justification; not exposition but explanation. They answer the question What?, not with a How? but with a Why? Hence the central problem of much political science is the reconciliation of liberty with authority, rather than the most practicable means of social adjustment. Hobbes employed the concept of the social compact to justify monarchy; his interest was ethical, not historical. So it was with Locke, with Rousseau, with Bossuet, with de Maistre. So it is with Bluntschli, with Burgess, with Bosanquet, with Willoughby. Their analyses are deductive; for them Liberty, Justice, Law, are entities of self-evident value, principles derived intuitively thru a study of an ideal system. Their method 'assumes certain abstract conceptions and expounds them dogmatically in general terms, putting aside the appeal to experience. If actual societies differ from the idealistic conception of them, so much the worse for those societies.'[1] From their principles they try to discover the logical implications, not the empirical manifestations.[2]

Such a procedure is proper for a social philosophy, for the formulation

1. Hobhouse, op. cit., 20-1.

2. 'The Austinian view of sovereignty . . . is the result of abstraction. It is arrived at by throwing aside all the characteristics of government and society except one. . .' Maine, Early History of Institutions, 359. 'Those who attempted to find the basis of political obedience after the revolutions of the sixteenth century did not induct from the empirical evidence, but tried to found their interpretation and their remedy on dogma. . . . Thus, tho Hobbes . . . was essentially a pamphleteer with a political panacea, he disregarded facts, and tried deductive jurisprudence. Hobbes had an excuse in the times, but Bentham had less, and when Austin tried to unite de iure and de facto sovereignty, he is futile and irrelevant and dangerous.' Bryce, op. cit., 532 et. sqq. Cf. Wallas, Human Nature in Politics, 138.

of a social ideal, a Utopia. The mistake occurs when the philosopher tries to superimpose his scheme upon an actual world, and thus to secure a pragmatic sanction for his cerulean image. From an elaboration of principles, he descends to practicalities, and sees in the latter embodied ideals. What should be becomes what is, and what is becomes what should be.[1] The transformation is understood when we remember that 'in social investigation large and unproven principles are apt to be either mere generalisations of customs or institutions which happen to be familiar to the writer, or expressions of his ideals, or very possibly a fusion of the two.'[2] But comprehension does not condone; the preachments of Hegal and Bosanquet remain enervating to the will of the social scientist. We can, of course, laugh at the extremes reached by the more tenacious of this school. The vicarious sexuality given the state by Bluntschli amuses us. Yet it is an emphatic indication of the trend of the metaphysical process, and but an exaggerated instance of the many confusions involved.

Their analysis of the socially desirable centers upon the state.[3] With one accord, they perceive that some organ of social control is necessary to correct the abuses or omissions which sponsored their excogitation. This organ is the state, which thus comes to possess an ideal function, correspon-

1. 'The insight to which . . . philosophy is to lead us is that the real world is as it ought to be.' Hegel, Philosophy of History, 38. Cf. Hobhouse, op. cit., 17-23.

2. Hobhouse, op. cit., 21. Bosanquet, speaking of the sources of Hegel's polity, says: 'At that time the idea of a man's country, as focussed in the state, was a glorious vision, stimulated largely by Greek conceptions and drawing something from English constitutional experience; while in the existing reality of the Prussian system there was little to catch the eye, and little power, therefore, to narrow the outlook.' 'Patriotism in the Perfect State', op. cit., 133. Cf. Hobson, Democracy after the War, 113-4; Croly, op. cit., 221.

3. 'In modern thought . . . the interest of the State has come become again, just as in the Greek civilisation, the ultimate principle in the science of society. . .' Kidd, op. cit., 98.

dent with the contemporary Weltgeist. Today it is usually the common good, or the general welfare.[1] Thus the state, as an ideal concept, is an end-in-itself (Selbstzweck). From this ethical postulate, there proceed certain inevitable corollaries, necessary to maintain the ideal structure. 'The state must have the power to compel the subject against his will; otherwise it is no state; it is only an anarchic society.'[2] 'The state is the embodiment of the national power. This power considered in its highest dignity and greatest force, is called sovereignty.'[3] 'Where there is no longer any sovereign possessing authority, where the governed have renounced political obedience, and every one does that which is right in his own eyes, this is anarchy, and the State is at an end.'[4] 'Sovereignty belongs to the State as a person, and represents the supremacy of its will.'[5] 'It is necessary to recognise in the state a power to which all things and all wills are potentially subject, otherwise the state is no different from other associations and organisations into which mankind is grouped.'[6] From the position thus reached, further deductions are made to suit the temperament of the author. With Austin, we may say:[7] 'Hence it follows that it is only thru an ellipsis, or an abridged form of expression, that the society is styled independent.

1. 'The State is fundamentally and in its true nature an organisation adapted to the carrying out of certain specific functions which must to some extent be performed in any social system.' Cole, Labour in the Commonwealth, 185. Cf. Sidgwick: The state is 'a body of human beings, deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government, which represents the society in its collective capacity, and ought to aim in all its actions at the promotion of their common interests.' Elements of Politics, 211-2.

2. Burgess, op. cit., Vol. I., 55.

3. Bluntschli, op. cit., 463. 'The State is a community of men elevated into an autonomous personality and acting by itself.' Stein, op. cit., 23.

4. Bluntschli, op. cit., 16-22.

5. Willoughby, Nature of the State, 195.

6. Garner, op. cit., 256.

7. Brown, op. cit., 97.

The part truly independent is not the society, but the sovereign portion of the society.' This exalts the political institution above all legal restraint.[1] Or with Bentham, we may conceive that the sovereign is but a means for the fulfillment of individual ends.[2] Or we may follow the Neo-Hegelians, who, dissatisfied with the foregoing conclusions, attempt to reconcile the individual more fundamentally with the coercive organ. This is done by means of two further principles, that of the nature of individuality and that of the general will. By recognising as the will of the individual only that portion of it which obeys the mandates of government, and by identifying the 'real' will with the general will, which in turn is identical with the will of the state, -- we have already assumed that the state is the expression of the common good, i.e., law is the expression of the general will -- we reach a logical position where the reality of force as a method of political obligation is denied, for the individual is forced to be free.[3]

Here is a complete construction of society, a rounded system. As an ethical ideal it is conceivable,[4] for even in Bosanquet's state the individual

1. Ibid., 231-2; 'The Austinian position that a supreme legislature is incapable of legal limitation, is a position which does not rest, as Austin supposes, upon logical necessities, but upon the humbler ground of expediency.' Ibid., note of the editor, 164.

2. Cf. Bosanquet's comment, so suitable for his own construction; Theory of the State, 80.

3. For a detailed analysis of this development, see Hobhouse, op. cit., Lectures I-IV., esp. pp. 17-90. It is on this ground that the compact theory is unsuited to the orthodox theorist; 'The Contract Theory errs in conceiving the State as created by individuals rather than by a People. It is thus atomistic and entirely destructive of political authority, for so long as such authority is made to rest upon individual consent, just so long may such consent be withdrawn.' Willoughby, Nature of the State, 125; cf. Bluntschli, op. cit., 282.

4. To enter here into a criticism of the metaphysical concept of the individual involved in this position would be irrelevant and tiring. Suffice it to say, that such as Bosanquet are recognising the whole as something distinct from its parts; that they confuse two types of experience in identifying our

is permitted to think what he pleases. It is as a political criterion that we judge it; as an exposition of social institutions. For it is here that the transition is made; once the system has been finished, the philosophers fit it into the fabric of everyday living, and say that it works, that what does work is it. From saying that the state is an organisation for the realisation of the common welfare (an ideal), Bosanquet defines it as an institution which 'is habitually recognised as a unit lawfully exercising force'[1] (an idea expressive of prosaic fact). The ideal and the real are identical, and now the philosophers have a theoretic foundation which defies rebellion. To question the theory is mere blindness to the facts of social order.

It is impossible to escape this conclusion. The weight of evidence convicts the orthodox political theorist. Willoughby, for instance, all unconsciously summarises the confusion in the following passage:[2] 'While in the State we have simply a legal personality, we have in the human being a double personality; first, as an individual endowed with rights and obligations as regards his relations to other individuals and to the political community in which he lives; and, secondly, as an individual endowed with reason and volitional power, and recognising a duty to strive disinterestedly to make his life conform to the highest moral and ethical ideals.' That is, he has absorbed the free will of the individual into state duty, and then arbitrarily created another realm of individual initiative in which, apparently, all 'striving' will be in a vacuum; for a few pages before the passage quoted,

will with the 'real' will; that by omitting from consideration all else in our will they destroy the validity of any distinction between the good and the bad in actual institutions; and thus condemn the individual to passive submission, and the philosopher to the task of 'stating the nature of society in terms revealing the ideal elements which mere facts have a tendency to veil from our human eyes.' Hobhouse, op. cit., 18. Cf. Bussey, 'Dr. Bosanquet's Doctrine of Freedom', in Philosophical Review, Vol. XXV, 711 sqq.

1. Bosanquet, Theory of the State, 186.

2. Willoughby, Nature of the State, 139.

Willoughby has told us that the individual 'is an integral and inseparable part of the political body, and his will cannot be separated from its will', and that for him 'civic subordination is one of necessity.'[1] Again, he tells us that the general will may find expression thru agents, yet simultaneously the will is a unit.[2] Tho he admits failings in the social structure,[3] he nevertheless demands for it as unquestioning obedience as tho that structure were perfect.

Burgess is not so casuistical. On page 52, he assures us that sovereignty is 'original, absolute, unlimited, universal power over the individual subject and over all associations of subjects. . . . The principle cannot be logically <u>or practically</u> avoided. . .'[4] On page 71, he confesses:[5] The fact is, that the organisation of the state outside of, and supreme over, the government is, as yet, everywhere incomplete; and that when we assign to it this separate and supreme position, we are, in greater or less degree, confounding the subjective with the objective state, the ideal with the actual state.' This is a frank admission that the metaphysical theory is an attempt to explain actualities by ideal standards. Burgess surrenders before the battle is fairly started.

1. <u>Ibid</u>., 126, 127.

2. <u>Ibid</u>., 194-5.

3. 'The existence of defects in the organisation of government, and the intermediation of selfish and corrupt influences, prevent, in all States, the formation of a <u>general</u> will free from the admixture of <u>particular</u> elements; and hinder the exact performance of that will when formulated. Hence it is, that there is ever a disparity between the real political idea of a community and the actual utterances of the State as contained in its law.' <u>Ibid</u>., 140-1. Such a disparity appears not to shake the equanimity of his faith in the soundness of his construction.

4. Burgess, <u>op</u>. <u>cit</u>., Vol. I., 52-3. The underscoring is mine.

5. <u>Ibid</u>., Vol. I., 71.

Maine also tried to make the theory gibe with the fact. 'It is always the State which causes laws to be obeyed.' Such is his confident assertion; yet he apparently feels that his proposition is after all not self-evident, for he continues;[1] 'It is quite true that this obedience is rendered by the great bulk of all civilised societies without an effort and quite unconsciously. But that is only because, in the course of countless ages, the stern discharge of their chief duty by States has created habits and sentiments which save the necessity for penal interference.' And yet these two statements are found in the same paragraph, and Maine feels no incongruity. At this point, at least, Austin merits our sympathy, for his strict delimitation of the field of the concept, law.[2]

Bluntschli is open to similar objections. That he is thinking of actual institutions is sufficiently shown by the following passage. 'The personality of the State, is, however, only recognised by free people, and only in the civilised nation-states has it attained to full efficacy. In the earlier stages of politics only the prince is prominent; he alone is a person, and the State is merely the realm of his personal rule.'[3]

Bosanquet clarifies the orthodox position further, when he says that the state is a brief expression for states qua states,' and remonstrates with his critics for suggesting from observation, lacunae in his theory. He says they 'attribute to states that which qua states they are not, namely defects which the state organisation exists to remove.'[4] In other words, in

1. Maine, Popular Government, 63.

2. 'The habitual independence which is one of the essentials of sovereignty, is merely independence of laws imperative and proper. By laws which opinion imposes, every member of society is habitually determined.' Brown, op. cit., 120.

3. Bluntschli, op. cit., 22; note also his insistence upon the element of fixed territory, necessary to a state. Ibid., 16.

4. Bosanquet, Social and International Ideals, 275.

so far as states are states, they exemplify his theory of the state; which is saying absolutely nothing. Error is to the absolute idealist an illusion of the inferior will; evil is good inasmuch as it is a step toward the real end. 'Every state, tho one may recognise this or that fault in it, has always, especially when it belongs to the developed states of our own time, the essential moments of its existence in itself.'[1]

There can thus be no reasonable doubt that this confusion has been entertained. The theorists have built up an elaborate logical construction of the ideally desirable, and have then identified it, for all practical purposes, with the actually existent. The contemporary implications of such a position are obvious, and have been urged all too frequently in the past six years to need iteration. Burgess is conservative in saying that 'the highest human power over a given population is the state.'[2] 'The essential evil arises from the attribution in all modern nations of moral sovereignty to physically powerful states without any sufficient assurance of the use of the power for genuinely social purposes.'[3]

'It is the characteristic of an abstract theory to admit of quite opposite applications.'[4] Out of the confused nebula of intuitive principles upon which the metaphysicians found their state have been erected systems actually as antagonistic as those of Prussia and Britain. By the simple expedient of taking things for granted, a case may be made for anything. This has been the procedure of the theorists.

1. Hegel, Philosophy of Right, 313.
2. Burgess, op. cit., Vol. I., 75.
3. Croly, 'The Future of the State', in New Republic, Vol. XII, 181.
4. Ritchie, op. cit., 87.

Their structures have all too frequently been an apology for a cause, as, e.g., Hobbes and Treitschke. But even when the subject has been approached with conscious impartiality, material influences have been at work. 'Few discoveries are more irritating than those which expose the pedigree of ideas.'[1] The wide generalisations made have rested on restricted induction, or upon vested habits of thought. From the peculiarities of environment or local history, phases of institutional development have been taken as universal and permanent.[2] Prejudice in other fields of thought has often warped the political structure of the theorist.[3] The type of training thru which he has gone bends his mind from the straight and narrow path.[4] This is conspicuously true in political science; the majority of modern theorists have been nurtured on the intuitive logic and idealist philosophy prevalent in the eighteenth and nineteenth centuries. This has given them a bias toward conservatism. For them truth is discovered, not made; immanent in the universe (whether it be that of the realist or that of the rationalist)

1. Acton, History of Freedom, 62.

2. Cf. Maine's interesting comment upon Austin's system: 'The Western world to which they (the Austinians) confined their attention, must be conceived as having undergone two sets of changes. The States of modern Europe must be conceived as having been formed in a manner quite different from the great empires of the East, and a new order of ideas on the subject of legislation must be conceived as having been introduced into the world thru the empire of the Romans. Unless these changes had taken place, I do not believe that the system would ever have been engendered in the brain of its author.' Early History of Institutions, 385-6; see also, Ch. I, supra.

3. Of course, this is shown in spectacular fashion thruout the state-Church controversy. Cf. Laski's books, op. cit., and Figgis, Churches in the Modern State. There is also much to be said on the trite subject of the predominance of legal minds in political theory; sc. Sidgwick, Development of European Polity, passim; Figgis, Divine Right of Kings, 278 sqq; Croly, Promise of American Life, passim.

4. Here too the legalist dominates; with all the legislation of modern times, the ancient concept that the function of the legislator is merely to discover eternal principles, survives. Cf. Pound, 'Juristic Problems of National Progress', in American Journal of Sociology, Vol. XXII., 721 sqq.

are fundamental principles. To excavate them is the meaning of progress. Thus they approach the study of institutions with a static philosophy, and an intellectual affinity for abstraction. They are endeared to certain entities, for it is with these entities that they conjure, and it is in terms of them that they have been taught to think. And it is easier so.[1]

But these habitual entities, 'these personifications and uniformities, in their turn, tempt us to employ in our political thinking that method of a priori deduction from large and untried generalisations against which natural science from the days of Bacon has always protested.'[2] And this is the substance of our charge against the orthodox political theorists. Their synthesis is a fine-spun web built upon abstraction,[3] Their assumptions are exact formulae, dogmas of faith from which 'everything that can be deduced without breach of logic is truth.'[4] 'The practical value of all sciences founded on abstractions depends on the relative importance of the elements rejected and the elements retained in the process.'[5] The trouble with the metaphysical analysis is that too much has been left out. It leaves out the web and tissue of social life.

2. Of the Rebellion.

An acute observer of social institutions, writing seven years ago,

1. 'In thinking about politics we seldom penetrate behind these simple entities which form themselves so easily in our minds. . . . Political abstractions, such as Justice, or the State, stand in our minds as things having a real existence.' Wallas, op. cit., 138.

2. Ibid., 139.

3. Bryce finely criticises the theory of sovereignty: 'It has nothing to do with the actual forces that exist in a State, nor with the question to whom obedience is in fact rendered. . . . It represents merely the theory of the law. . . . The actual receiving of obedience is not (as some have argued) the characteristic mark of a sovereign authority, but is a postulate of the law with regard to each of the authorities it recognises.' Studies, 509.

4. Faguet, Cult of Incompetence, 205. 5. Maine, Early History, 361.

said;[1] I think it clear that within recent years an uneasy suspicion has come into being that the principle of authority has been dangerously impaired, and that the social system, if it is to cohere, must be reorganised.' Dicey trembles before the increase of disrespect for law;[2] Willoughby utters tearful forebodings.[3]

This is but another indication of the static point of view of the orthodox theorists. They are purblind to change. No theory can survive in toto such institutional changes as have occurred since Hegel's time; above all, no theory which rests upon the status quo. New habits of thought and feeling, new organisations of social life, new channels for expression have appeared since 1800, and these demand explanation and inclusion in any adequate political theory.[4]

To take one example, the theory of sovereignty. 'Sixty years ago, sovereignty was a simple question of quality. Austin had demonstrated that there must be a sovereign somewhere, and that sovereignty . . . must be absolute. But the Congress which in 1885 sat at Berlin to prevent the partition of Africa from causing a series of wars . . . was compelled by the of the problems before it to approach the question of sovereignty on quantita-

1. Adams, Theory of Social Revolutions, 1.

2. Dicey, op. cit., introduction.

3. 'Now, as in the sophistic period of Greece, the binding power of tradition and the necessarily sancrosanct character of the demands of both State and Church are questioned. . . . (There is) danger lest this individualisation of moral authority result in a decentralisation of moral obligation, which, if not regulated by well-established principles of conduct, will give free play to individual prejudices or passions, with a resulting loosening of social and political bonds.' Willoughby, Social Justice, 216.

4. Cf. Wallas, op. cit., 61.

tive lines.'[1] In external relations, therefore, sovereignty is no longer unitary; there are gradations of sovereignty. All this is contrary to the absolutistic theory.

'We are living in the midst of a type of social order which can only have come to hold its place in the past, and which can only continue to hold its place in the future, in respect of one ruling quality alone, its own fitness in the never-relaxed strain and stress of an ascending process of evolution.'[2] In such a spirit do the current critics of the orthodox conception approach their analysis. Their test is a pragmatic one. Institutitions are to be judged by their achievement, and to be constructed on a basis of functional utility. The social system they recognise as complex; they attempt to discover scientific laws of social engineering with which the system can operate most effectively.[3] Unlike the metaphysicians, their first question is not Why? but How? They refuse to accept presuppositions unquestioned; they work under strict principles, as we shall see, but their princi-

1. Ibid., 160-1. Cf. Merriam: 'For the purposes of International Law, sovereignty is regarded as the aggregate of these powers (of making war, independent legislation, etc.), rather than as an indivisible principle out of which they all emanate. Hence, being a sum or mass of rights, a part may be taken away without wholly destroying the sovereignty. The sovereignty may be less perfect, but it is still severeignty.' The History of the Theory of Sovereignty from Rousseau, 213. The feeble attempts of the orthodox theorists to avoid the issue fail; neither the German theory of auto-limitation, nor Austin's apology, avail. The latter says: 'The definition of the abstract term independent political society . . . cannot be rendered in expressions of perfectly precise import, and is therefore a fallible test of specific cases. The least imperfect definition which the abstract term will take, will hardly enable us to fix the class of every possible society.' Brown, op. cit., 103.

2. Kidd, op. cit., 140.

3. Wallas suggests the nature of the material whence is to be built a new foundation for political science. 'The facts concerning human nature when collected must be arranged . . . under three main heads: descriptive facts as to the human type; quantitative facts as to inherited variations from that type observed either in individuals or groups of individuals; and facts, both quantitative and descriptive, as to the environment into which men are born, and the observed effect of that environment upon their political actions and impulses.' Op. cit., 122.

ples are based on a wide induction from experience. In short, their approach is realistic. For them whatever accords with or sponsors or aids their fundamental principles, is subjected to criticism to test iys validity in terms of institutional life. It deals, not with logical corollaries, but with human relations. It believes that a theory finds its truth in its application, not that the present social system is ideal. For it 'the ethically right must be sociologically possible.'[1]

B. Principles of Analysis.

The rebellion is indeed against the authority of the monistic state. It is a moral revolt of the individual, who instinctively feels himself cramped when faced with the omnipotent state of the metaphysicians. And fundamentally this is because of the very inconsistency which lies at the bottom of their structure.[2] The confusion of the real with the ideal denies all ethical validity to private judgment concerning political action. The Hegelian state is absolutely good, and allows the individual nothing but acquiescence in its conduct.

It is this moral pre-eminence of the state that is the philosophical crux of the attack. Proceeding from a functional analysis, the critics deny to the state this moral sanction. In the words of Cole:[3] 'They (i.e., the orthodox) contend that the individual human being expresses himself thru his Commonwealth in some finer and diviner way than in his own being; that his greatest self-realisation is to lose himself in the great soul of his country, and a lot of similar nonsense. I contend that, whereas a man may express

1. Hobhouse, op. cit., 15.

2. Supra, p. 51.

3. Cole, Labour in the Commonwealth, 37-8.

himself largely thru his Commonwealth or some other group to which he belongs, there is no inherent superiority in such expression over his purely personal expression of his own individuality. I contend that his individuality is the fundamentally important thing, of which all groups . . . are merely projections.'

In other words, the basis of the new theory is pluralistic; from the start the critic dehies that the state is an end-in-itself, a self-explahatory unit. There are many ends in society. According to Laski:[1] 'We do not proceed from the State to the parts of the State on the ground that the State is more fundamentally unified than its parts, but we, on the contrary, admit that the parts are as real and as self-sufficient as the whole.' It is thus a realistic return to the ultimate value of the individual, the unique person. 'In the monistic theory of the State, the individual derives his meaning from his relations; in the pluralistic theory, while his relations may be of the deepest significance, it is denied that they are the sole criterion by which a man ought to be judged.'[2]

Yet this individualism is not of the old disjunctive sort. The the man of the pluralists may have an ideal world inconnected with that of another,[3] his life is not solitary.[4] Social psychology has shown that Aristotle's dictum is magnificently true; and it is this real individuality which pluralism endeavors to free from absorption by the monistic state. To quote Laski:[5] 'It

1. Laski, Problem of Sovereignty, 9.

2. Ibid., 11.

3. 'However organic be the community in which we live, man is a solitary no less than a social being, and his ideal world is at bottom interstitial.' Ibid., 264.

4. 'You speak of the isolated individual! But where do you find such a thing as an isolated individual?' Leroy-Beaulieu, op. cit., 52.

5. Laski, Problem of Sovereignty, 24.

is an individualistic theory of the State — no pluralistic attitude can avoid that. But it is individualistic only in so far as it asks of man that he be a social being. In the monistic theory of the State there seems no guarantee that man will have any being at all.'

From birth the human being naturally tends to join himself with his fellows in common enterprises.[1] Such primary groups rapidly acquire emotional support, in proportion as they achieve the purpose for which they were originally willed by the individual members.[2] Thus from childhood, if not before, social ideals are formed which become both the motive for and the test of social groupings.[3] These groupings are the product of individual desires. They are organisations created in respect of some common purpose, and it is only thru them that the socio-individual can develop his individuality. By organisation he is able to achieve in a complex world what would otherwise be impossible.[4]

The reality and the value of these associations are insisted upon by the pluralist. Inasmuch as they are the instruments by which the individual functions as such, they possess an ethical value. 'We do point to groups within the State, or parallel to it, and urge that they are really harmful or really beneficent. We judge them in reference to themselves.'[5] This is the second assumption of the critic of the orthodox theory, an assumption derived from a study of the nature of the individual.

1. 'Man is a being with a natural taste for association, not association of the fixed, immovable sort imposed from without, and embracing his whole existence, like the instinctive associations of bees, but associations of a flexible and variable kind, and in every possible form. This natural taste has been still further developed in man by education and experience.' Leroy-Beaulieu, op. cit., 52.

2. Cf. Wallas, op. cit., 73-6.

3. Cooley, Social Organisation, 32.

4. Jenks, State and Nation, 9.

5. Laski, Problem of Sovereignty, 9.

C. Criticism of the State.

With these two presuppositions in mind, the critic proceeds to test the efficacy of the othodox state. What are the practical consequences of the metaphysics we have analysed? Does the state function as it should? Does it fulfill the ethical ideal it has been given by its defenders? Is it capable of constructive action for the good of the individual and the progress of society?

1. The Nature of Law.

It is natural that the critic should start with a scrutiny of law; for it is thru law that the sovereignty of the state is manifested and its supreme power for good is, hypothetically, exercised. The critic lingers but little over the theory that the law is the command of the sovereign.[1] When such disciples of Austin as Brown admit that there are many factual limits upon the power of the sovereign,[2] and that only be a meaningless divagation is the sovereign legally unlimited,[3] the pluralist feels no need to justify his rejection

1. Cf. Bentham, Principles of Morals and Legislation, Ch. 17; Brown, op. cit., 342, 354; and Ch. II, supra.

2. Cf. Brown, op. cit., note of editor, 157.

3. Cf. Sidgwick, Elements of Politics, note, 22: 'I agree with the critics of Austin in thinking that the connectiob of "command", -- implying announcement of wish, together with power and purpose of punishing its violation -- can only be applied in an indirect way, and by a process of inference sometimes rather complicated, to many of the rules which make up the aggregate of civil law. Still I think that Austin's conception is always applicable, if it is interpreted as meaning only that the expectation of some penalty . . . constitutes a motive for conforming to the rules we call "laws".' To such infantile extremes will the theorist go to uphold an empty creed. In fairness, comparison of this should be made with the following: 'But if it be admitted that the obedience of subjects may be actually limited by distinctly recognised conditions, the proposition that the power of the sovereign is not legally limited becomes insignificant; since it does not mean that it is not subject to limitations which even lawyers will recognise, but merely that it is not limited by the sovereign's own command -- which no one can ever have supposed it to be.' Ibid., 22. Sidgwick nearly gives away his case. This position is that adopted by Brown in his treatment of Austin; cf. Brown, op. cit., note of editor, 157 et passim. It is also the theory of Ihering.

of the theory. The Neo-Austinians still insist that when the sovereign power binds itself by law, it remains legally omnipotent; but this is mere hero-worship. A contract with the state is a contract in the eyes of the law, and the state in such cases is subject[1] to the rulings of its own courts.[2]

The federal form of government has always bothered the orthodox theorist,[3] and this is especially true in juristic theory. Lowell has brilliantly shown the significance of the situation. 'If the sovereign's power to make laws can be limited to a certain class of affairs, it is clear that other matters not within these limits may form the sphere of action of another sovereign, and thus two sovereigns may issue commands to the same subjects, each being supreme in his own department.'[4] Such has more than once been the fact; history tells to some purpose of the struggles of church and state.[5] It is needless to say that such a situation is contrary to the monistic theory of sovereignty.

History also gives overwhelming evidence to the effect that laws have not always had even the appearance of being commands of the sovereign.[6] The function of law-making is comparatively novel in the history of political societies; yet the orthodox theorist does not perceive the obvious deduction.

1. Ordinarily; there linger traces in the continental courts where the sovereign is exempt from liability and suit; but cf. Duguit, op. cit., passim; Moore, op. cit., passim.

2. Brown, op. cit., note of editor, 194.

3. Note Dicey's famous insinuations as to the permanence of this form.

4. Lowell, Essays on Government, 216.

5. Cf. Bryce, op. cit., 499-502; Laski, Problem of Sovereignty. It is interesting in this connection to note the comment of Bosanquet: 'The history of ethics and religion has little bearing upon true political theory between the death of Aristotle and the awakening of the modern consciousness in the Reformation.' Theory of the State, 10. Thus he disregards most of the movement antithetical to his theory; cf. Figgis, From Gerson to Grotius, passim.

6. Cf. Jenks, Law and Politics in the Middle Ages; Maine, Ancient Law.

If laws once were not commands, perchance they may sometime revert to that happy condition.

Indeed, today 'most laws do not belong in their form or their meaning to the category of commands.'[1] There is occurring a 'differentiation . . . between those laws which derive their obligation from the will of the governing agency, and those laws which derive their obligation from the consensus of individual interests. . . . That kind of law initiated by the consensus of individual interests, precedes the kind of law initiated by political authority. . . . The, as political authority develops, laws acquire the shape of commands, even to the extent that those original principles of social order tacitly recognised at the outset, come to be regarded as obligatory only because personally enacted, yet the obligation derived from the consensus of individual interests survives, if obscured.'[2] Spencer continues, showing that with the development of the present industrial regime 'there again grows dominant this primitive source of law — the consensus of individual interests.[3] Law is no longer a command, but a regulation of society for social co-operation.

Moreover, there is some doubt as to the applicability of the orthodox theory to the facts and needs of modern life. 'When it is attempted to transfer the principles and conclusions of law to the sphere of controversies in which not only vast interests, but also violent passions are engaged, there is danger that the law may turn out not to have been made for the new facts and not to be capable of dealing with them, 'so that efforts to apply it to them will not carry the full weight which law ought to assert.[4] The current

1. Bryce, op. cit., 500.
2. Spencer, Principles of Sociology, Vol. II., Pt. V., 527-8.
3. Ibid., 528.
4. Bryce, op. cit., 551.

movement toward administrative decentralisation is considered by Dicey to be a device for 'preventing law courts from intervening in matters not suited for legal decision.'[1] 'Society has been squeezed . . . from its rigid eighteenth century legal shell, and has passed into a fourth dimension of space, where it performs its most important functions beyond the cognizance of the law, which remains in a space of but three dimensions.'[2] From the point of view of the legislator also, the theory fails to measure up to modern requirements. 'Under the reign of a juristic theory of the futility of conscious law-making, especially when there goes along with it a political theory of sovereignty in the general will, it is inevitable that the popular law-maker who is told by jurists that he cannot make law should answer, after the manner of Diogenes, by taking up his roll of bills for acts, and saying, solvitur lege ferenda. Thus those who should guide the lawmaker think it quite needless for him to act, and he is left to experiment as best he may with a power of issuing commands in the name of organised society certified to him authoritatively by our political theory.'[3] This is one cause of dissatisfaction with current legislation.

'The truth seems to be that the difficulties which have been supposed to surround the subject of sovereignty are largely factitious difficulties, and spring from the attempts made to answer questions essentially different by the same terms.'[4] The legalists have tried to do what the theorists have done, namely, to confuse an ideal concept with actual fact. 'So long as we are satisfied with the mere logic of a terminology, the juristic theory of sovereignty will remain as impregnable to assault as it is inapplicable to

1. Dicey, op. cit., xxxix.
2. Adams, op. cit., 12.
3. Pound, 'Juristic Problems of National Progress', op. cit., 726.
4. Bryce, op. cit., 542.

the facts of life.'[1] Law as a command of the sovereign may remain a neat phrase for the lawyer; but it does not explain political society.

Above all, it does not explain the nature of obedience. To say, for instance, that 'such obedience, whatever its other sources, is greatly due to the fact that the ruling part . . . inflicts punishment,'[2] is to ignore social psychology. The insistence upon the necessity of supreme power is a demand of abstract logic; sovereignty means supremacy, supremacy requires physical power, power implies obedience, therefore obedience is rendered the commands of the sovereign. Such reasoning is beyond the test of experience; in apology it may be urged that juristic theory is not concerned with experience,[3] but that is a prima facie surrender of all claims to social utility.

'To assume that human nature will change as soon as provisions for State compulsion have been withdrawn is to misread human nature. . . . The decline of respect for the State, or even the growth of a habit of disobedience to State authorities, so far from implying a decline in the motives and forces which produce obedience generally, may indicate nothing more than that people have begun to obey some other authorities.'[4]

This is apparently what is not happening; such instances as the Scotch Disruption, and the strike of the Welsh miners during the war, demand a new

1. Laski, Introduction to Duguit, op. cit., xxv-xxvi.

2. Platt, op. cit., 296.

3. 'With the fact that obedience is in any given community rendered imperfectly, or rendered not at all, law as such has nothing to do.' Bryce, op. cit., 509.

4. Ibid., 486. Cf. the plaint of Dicey: 'When a large body of citizens not only are opposed to some law but question the moral right of the State to impose or maintain a given law, our honest democrat feels deeply perplexed how to act. He does not know in effect how to deal with lawlessness which is based upon a fundamental difference of public opinion.' Op. cit., xxxviii-xlii.

theory of obedience and of law. It is no longer sufficient to say that the law is a command of the sovereign. 'A command . . . becomes a law, not because it ought to be such, or because it proceeds from a person in other respects sovereign, but only in case it is really obeyed; and in the same way the extent of sovereign power being . . . a pure matter of fact, depends entirely upon the extent of the obedience actually rendered.'[1] Obedience is a matter of fact, not of hypothesis; 'law as a command of the sovereign' does not illuminate the nature of civil society.

2. Representative Political Democracy.

The theorists thereupon fall back upon the argument that law, as the voice of the representatives of the people, is the expression of the general will. The people are sovereign, and freely submit to the rulings of their chosen leaders. The people recognise that only by submission to the commands of their representatives, may they, the people, attain true freedom within an organisation. 'The modern State develops the common freedom of citizenship in all classes, and compels everyone to submit to its authority.'[2] Government is composed of nothing more or less than the instruments by which society accomplishes its objects,[3] and in a democratic society these objects are those of common welfare.[4] This, in brief, is the theoretic position.

In it there is a grave confusion of ideal and fact. Government is de-

1. Lowell, op. cit., 222.

2. Bluntschli, op. cit., 59.

3. Jenks, State and Nation, 8.

4. The modern theory of democracy is 'the theory of the "State" efficiently organised towards the interests of its members. . . . The keynote to the prevailing theory of social progress is that the interest of the state and the interest of society tend to become one and the same; and that the tendency of all modern progress is to render the spheres of the moralist and of the legislator identical.' Kidd, op. cit., 73. I know of no better indictment of the metaphysical theory.

fined as the agent for promoting the common welfare; and being invested with sovereignty, its promulgations are presumed to further this aim. The conclusion does not logically follow. To say that government promotes the common welfare means two things. It may mean that such is the purpose of the government; and it may mean that such is the actual consequence of governmental action. In the orthodox theory, these two meanings are not distinguished.[1] 'It may be permissible to define a structure by its function, provided the definition be unambiguous . . . If every government performed the function of promoting the common good and no other, there would be no harm in defining the state as that which exists for the common good, but if, e.g., the state is in the hands of a governing class which governs for selfish ends, it does not perform this function. Do we mean by the state the organisation which sustains government or the organisation which sustains a peculiar kind of government aiming at a particular kind of purpose? If the latter, we must get another name instead of the state for every actual organisation in so far as it defects from our ideal, otherwise we shall never know whether we are talking about the ideal world or the real world.'[2] This is the confusion into which the orthodox theorists have fallen, despite all their protestations about the distinction between state and government.

'Men cannot be represented, and any attempt to represent them is more or less abstract and misleading. . . . As soon as we try to represent men as such, we get misrepresentation, and the substitution for the wills of the

1. 'It is observable that along with a tacit implication that the consensus of individual interests affords the warrant for law, there goes the overt assertion that this warrant is derived from the formulated will of the majority: no question being raised whether this formulated will is or is not congruous with the consensus of individual interests. In this current theory there obviously survives the old idea that there is no other sanction for law than the command of embodied authority.' Spencer, op. cit., 533.

2. Hobhouse, op. cit., 22, note 2.

"represented" of the wills of those who are supposed to represent them.'[1] 'Institutions which exist for specific purposes can be truly representative of the common purpose of their members, whereas no institution can really represent men in general, apart from specific purposes which they have in common.'[2] Thus it results that the state, thru its organ the government, psychologically cannot represent the people. The metaphysical speculations of the political absolutists[3] do not escape the conclusion that 'what is called the will of the people really consists in their adopting the opinion of one or a few persons.'[4]

That it is impossible for the people to participate directly in the details of governance is admitted by all theorists; but the orthodox dodge the deduction we have drawn by postulating a 'rule of public opinion.'[5] 'To prevent the divergence between the wishes of the sovereign and the wishes of subjects is the effect, and the only certain effect, of bona fide representative government.'[6] (And Dicey in this passage is contemplating such a govern-

1. Cole, Labour in the Commonwealth, 190.

2. Ibid., 188.

3. 'This sovereignty of the people, this general will, is only an idea, it will be said. It is an idea; but not therefore unreal. It is as real as the human spirit is real, because it is this very spirit striving for objective manifestation. It lives and grows, and becomes conscious of itself.' Ritchie, op. cit., 70. 'The acts of the government in every country which is not on the verge of a revolution are not the acts of a minority of individuals, but the acts of an uncrowned, an invisible sovereign, the spirit of the nation itself.' Ibid., 74. Bosanquet has pithily expressed the very position to which he is reduced: '"Self-government" is an idea which will be found to contain the true ground and nature of political obligation. But the rough and ready application of it which, for example, represents the individual as simply one with the community, and the community as therefore infallible in its action affecting him, is a pure example of fallacy, and may be justly characterised as a confusion pretending to be a synthesis.' Theory of the State, 54. Cf. McKechnie, op. cit., 130.

4. Maine, Popular Government, 89.

5. Cf. Bluntschli, op. cit., 449.

6. Dicey, op. cit., 81.

ment as that of Great Britain.) But this is no more than a subterfuge. 'The rule of public opinion means for the most part a latent authority which the public will exercise when sufficiently dissatisfied with the specialist who is in immediate charge of a particular function.'[1] Very rarely indeed does 'the public' become 'sufficiently' incensed; nowadays there are too many distractions for the individual. His mind will not concentrate upon complex administrative problems of government.[2] 'It is manifest that upon countless important public issues there is no collective will, and nothing in the mind of the average man except blank indifference.'[3] It is simply foolish to expect that the average person can form an opinion upon all subjects of national welfare; it is simply foolish to presume that one association, the state, can function as agent for all those interests. 'An institution represents might, and also, perhaps, right, but right organised, mature, perhaps gone to seed, never fresh.'[4] 'In antithesis to the institution, the person represents the wholeness of life. . . . A man is no man at all if he is merely a piece of an institution.'[5] Yet this is another confusion of identity made by the orthodox theorist; only the state represents public will and the state represents all public will.

Were it conceivable that public opinion should rule, in any comprehen-

1. Cooley, op. cit., 131. 'So long as the government is fairly easy and tolerant, the mere denial of a share in the control of public affairs is not acutely resented. . .' Bryce, op. cit., 483.

2. 'If the modern mind has developed one characteristic more markedly than another, it is an impatience with prolonged demands on its attention, especially if the subject be tedious.' Adams, op. cit., 4-5.

3. Wells, Anticipations, 147.

4. Cooley, op. cit., 320.

5. Ibid., 319. 'However much man acts in common, he wishes also to act alone, . . . It is, perhaps, an antinomy; but it is one which no theory of the State dare afford to neglect. . .' Laski, Problem of Sovereignty, 265.

sible meaning of the phrase, the government would not function with as great efficiency as is even now the case.[1] For while an institution, such as the state, depends upon the will of the community for its existence, it yet has 'a lasting independent life of its own; it is capable of growth and expansion; if national, it may perhaps acquire such a separate power of its own that law, that even force, cannot easily overthrow it.'[2] Under the influence of a changing environment, and the tendency of men to emotionalise the entities they have erected for a specific function,[3] the institution hardens into a weapon for the rulers, i.e., the administrators. 'Once set going, the state . . . might be characterised as a crescendo of power.'[4] It is this peculiarity of institutions which led Acton to remark that 'after surrendering the individual to the collective will, the revolutionary system makes the collective will subject to conditions which are independent of it, and rejects all laws, only to be controlled by an accident.'[5] And the same phenomenon led About to frame his epigram, which was to the effect that it was the pride of every Frenchman, when he looked in his glass in the morning, to think that he saw there the twenty-seventh part of a tyrant, but that he was apt to forget that at the same time he saw the whole of a slave.[6]

There is truth in these statements, because 'experience shows that the

1. 'If it were really possible to extract an opinion upon a question of politics from a great mass of men, and to shape the administrative and legislative acts of a State upon this opinion as a sovereign command, it is probable that the most ruinous blunders would be committed.' Maine, Popular Government, 89. The source of the quotation may be biassed, but its truth remains.

2. Woolsey, op. cit., Vol. II., 350.

3. Cf. Wallas, op. cit., 73 sqq.; MacIver, Community, 151 sqq.

4. Todd, Theories of Social Progress, 338.

5. Acton, op. cit., 299.

6. To be found in Seeley, op. cit., 163.

State is an organism which is committed to the hands of certain men, that the State neither thinks nor wills of itself, but that it thinks and wills only in and by the thought of the men who control the organism.'[1] Our democratic mechanism, backed with the idealistic doctrine of the sovereignty of the general will, has aided the rise within the society of an aristocracy of rulers.[2] 'These monopolise all the power of the state who alone enter into its nature and understand it.'[3] Owing to the growth of industrialism, economic power has become the controlling factor in modern civilisation; and because of the rigidity of the political system this economic power has grown up, outside the political concept. Our political system rested upon the dogmas of the sovereignty of the people, and the equality of all before the law. Neither of these has prevented the rise of the trust. Having constituted the state on a false and purely intellectual concept of human nature,[4] and having centralised legal power in one organ, legitimate economic interests were forced to gain control of that organ as a matter of self-preservation.[5] The true sovereign in soci-

1. Leroy-Beaulieu, op. cit., 47.

2. 'La democratie n'est donc qu'un regime de liberté et d'egalité de classe; elle exprime ce fait que le pouvoir est impossible entre individus egaux. Mais elle ne peut rien pour diminuer l'inegalité economique: voila pourquoi, il y a une puissance publique regalienne dans l'Etat democratique.' Leroy, Les Transformations de la Puissance Publique, 14.

3. Seeley, op. cit., 342. 'Such a development is health in itself, and yet . . . an aristocracy mau from the very moment of its birth be exposed to the oligarchical corruption.' Ibid.

4. Wallas, op. cit., 199.

5. 'The huge corporation and the political machine were both created to satisfy a real and permanent need -- the needs of specialised leadership and associated action in these two primary American activities. That in both of these cases the actual method of organisation has threatened vital public interests. . . has been due chiefly to the disregard by the official American political system of the necessity and consequences of specialised leadership and associated action. The political system was based upon the assumption that the individualism it encouraged could be persuaded merely by the power of words to respect the public interest. . . . These assumptions were erroneous; and when associated action and specialised leadership became necessary in local American politics, the leaders and their machine took advantage of the defective official system to build up an unofficial system, better

ety is that person or body of persons 'who can make his (or their) will prevail whether with the law or against the law.'[1] Hence it has resulted that the state tends to be dominated by interests other than those of the 'sovereign people'.[2]

The theory of political representative democracy is inadequate. It is inadequate because behind it there stands 'a theory of sovereignty which, because it makes political outcasts of those whose intimate beliefs it fails to control, is at war with all the deeper realities of human life.'[3] 'The assertion of the doctrine of popular sovereignty is, therefore, rather the beginning than the end of democracy. There can be no democracy where the people do not rule; but government by the people is not necessarily democratic. The popular will . . . must be expressed somehow in the interest of democracy itself.'[4] But such an interpretation cannot be expected from the orthodox theorists; their minds are impregnated with a false method, their view of society is truncated.[5]

suited to actual popular needs. . . . The consequence has been a separation of actual political power from official political responsibility.' Croly, Promise of American Life, 124-5.

1. Bryce, op. cit., 512.

2. 'The fundamental social fact of our movement, far more important than any security afforded by law, or than any machinery which the State can put into action, is the fact that livelihood is at the will of the possessors. . . . Most men now fear the loss of employment more than they fear legal punishment, and the discipline under which men are coerced in their modern forms of activity in England is the fear of dismissal. The true master of the Englishman today is not the Sovereign nor the officers of the State, nor, save indirectly, the laws; his true master is the Capitalist.' Belloc, op. cit., 85. Cf. Cole, Labour in the Commonwealth, 186.

3. Laski, Problem of Sovereignty, 137.

4. Croly, Promise of American Life, 179.

5. 'Will they (the theorists) go back to the premises and say, that if the sovereignty of the people and equality lead logically and imperatively to these conclusions, it is perhaps because they are false ideas, and because these conclusions prove them to be false? This is a course not likely to be taken, for the sovereignty of the people and the principle of equality are something more than ideas, they are sentiments. . .' Faguet, op. cit., 204.

Chapter IV.

THE DOWNFALL OF THE MODERN STATE.

A. State and Society.

'In the metaphysics of absolute idealism, every experience is combined with, taken up into, the total experience of the Absolute, and thus its partiality and unreality are transcended. In precisely the same way the individual is taken up into the social system, which for ethical purposes is the manifestation of the Absolute.'[1] 'The State, as the realisation of the substantial will, . . . is the rational in and for itself. This substantial unity is absolute unmoved end for itself, in which freedom reaches its utmost right, and has at the same time the supreme right against individuals, whose highest duty is, to be members of the State.'[2]

This is the position of the Hegelian theorists whom we have criticised. It is the position that society is an organism, with an end in itself; and the position is justified by basing it upon the general will. The critic denies this position on both theoretic and practical grounds.

Theoretically, Hegelian metaphysics does not demand the view that society is an organism. An organic unity is one inwhich the end is the unity of the parts, and in which the parts are therefore an element in the end. Now it may be true that 'the ultimate ideal is a state of society which is organic. It is true, too, that only thru our present society can that ideal be reached. . . . It may be granted, too, that the progress to that goal may safely be considered as made continuously thru society. Yet it does not follow that it would be well to regard our present society as an end. For altho our progress to the ideal is thru it, that progress is often negatively related to it. . . .

1. Sabine, 'Liberty and the Social System', in Philosophical Review, Vol. XXV, 667.
2. Hegel, Philosophy of Right, sec. 258

If the particular relations which constitute our present society at any moment are to be looked on as means (as they are) to be discarded when better ones can be found, this is sufficient to destroy the claims of our present society to be considered organic.'[1] 'We are not entitled to argue that the society of the present is an organic unity, because the ideal society is such a unity.'[2] 'We can gain nothing by calling society an organism unless we are prepared to assert that it is the end of the individuals composing it.'[3] Such a position the critics flatly deny.[4] To postulate a purpose lying within society, such as human well-being, or the general welfare, is no proof.[5] 'When we study historically any society, we learn that its character is to be discovered, not so much in the purpose it may announce, as in the life that it leads.'[6] The state is based upon will, but to assume that therefore its will is inevitably beneficent and efficacious, is pure mysticism. 'There is no will that is good merely by self-definition; it is actual substantiation in terms of the event that alone can be accepted as valid.'[7]

And it is here that the practical objections begin. The boundaries of

1. McTaggart, Studies in Hegelian Cosmology, 189-90.

2. Ibid., 188.

3. Ibid., 192.

4. 'When we accept the idea of the state as an organism, what is emphasised is subjection of its parts to the welfare of the whole. But, in sober fact, the welfare of the state means nothing if it does not mean the concrete happiness of its living members. For the individual regards himself as an end not less than he so regards the state.' Laski, Authority in the Modern State, 34-5.

5. Cf. McTaggart, op. cit., 176-84. Note that under Hegel's law of progress, -- thesis, antithesis, synthesis, -- philosophy, or mere man, can never say which trend should momentarily be followed; thus there is postulated an absolute value in the person, which is not erased by the fact that whatever occurs leads to the Absolute. Cf. McTaggart, 'Conception of Society as an Organism', op. cit., for an attempt to show that Hegel does not involve the organic view.

6. Laski, 'Ecclesiastical Trusts', in Canadian Law Times, Vol. XXXVI, 195.

7. Laski, Authority in the Modern State, 28.

the state cannot be considered commensurate with those of society, because as a matter of fact 'the authority that is exerted in the name of the state fails to accomplish that for which the state exists.'[1] The state exists to promote the good life, but 'the one thing by which we must be impressed is the absence of proportion between political purpose and its achievement.'[2] Before the pragmatic method the pretensions dwindle. Theorists may postulate that the state is sovereign and that it exercises its supreme power as the expression of the general will; but this is hardly helpful unless we know how in practice that will is expressed.[3] And a realistic analysis of the modern state suggests that 'what we term state-action is, in actual fact, action by government,'[4] and that government is controlled by interests.[5] 'The point is that the State is not equivalent to community, that the political association does not include and cannot control the whole life of man. The State is seen to be not community, but a peculiarly authoritative association within it.'[6] The state

1. Ibid., 52-3. 'There has been yet no state in history in which the consistent effort has been towards the unique realisation of the common good.' Ibid., 41.

2. Ibid., 37.

3. 'The idea of a "general will" that is necessarily good . . . seems to contribute but little to our understanding of the event. A will is "good" if it is a good will; but it is difficult to see why any character should be affixed to it until we have had time to watch it in actual operation.' Ibid., 67.

4. Ibid., 30.

5. 'Government exercises power not in the interests of any party or class within the state but in the interest of the state as a whole. But that is undisguised idealism. In sober fact, governmant is exerted in the interests of those who control its exercise. That is, indeed, progressively less true. But once the fact is clear that the result of government is in practice different from what theory makes it, the necessary inference is a suspicion of power.' Ibid., 40. Cf. the verbiage of Brown: 'Today the Imperial Parliament althe it is not an infallible exponent of a "general will", approaches sufficiently near to this ideal to make a conception of law as an expression of a general will, a representation, the not a verbally precise generalisation of actualities.' 'The Jurisprudence of M. Duguit', in Law Quarterly Review, Vol. XXXII, 178.

6. MacIver, op. cit., 35.

is not an organism, is not identical with society, for the sufficient reason that the individual has legitimate desires outside the state-context, desires which cannot be effectuated by the action of the modern state.[1]

This being so, we need to inquire what is the basis of obedience to the demands of the state, and to what degree the state may serve its members. The first is the problem of liberty, the second that of division of power. From an answer to these questions, may be gleaned some insight into the proper position and the function of the state in modern society.

'The establishment of liberty for the realisation of moral ideas . . . (is) the end of civil society.'[2] The basis of obedience is therefore consent. Obedience will be rendered to the state in so far as it secures the freedom under which man can feel himself an autonomous moral unit.[3] If the state is to serve the common welfare, the creative instincts of men must be aroused and given effective institutional outlets. Freedom must be organised;[4] else the state, as represented thru its organ, government, will be constantly tempted to transgress upon individuality. For, as we have seen, institutions have a life of their own, and tend to become exclusive and domineering; to pervert the end they are ideally to achieve.[5]

1. 'The state stands for an area of common good, not for the whole of common good. The life of the individual citizen cannot therefore be lived wholly in the light of the ideal for which the state stands.' MacIver, 'Society and State', in Philosophical Review, Vol. XX., 41. 'The fact that the State claims to be the community, and in fact exercises the greatest part of the community power, does nothing to prove that the State is rightfully the community, or its sole representative, or that it has an absolute claim upon the individual's loyalty and service.' Cole, Self-Government in Industry, 121.

2. Acton, op. cit., 298.

3. 'Men obey government because the return for their obedience is the "real" freedom it is the object of the state-life to secure.' Laski, Authority, 34.

4. 'Certainly deliberate organisation is necessary is opinion is to flow into channels where it can be effective.' Laski, 'Theory of Popular Sovereignty', in Michigan Law Review, Vol. XVII, 205.

5. Supra, p. 68.

Clearly the orthodox theory does not provide the solution.[1] In the Hegelian state, liberty is recognised, but it is liberty under law, and the law is the expression of a sovereign.[2] The frailty of such a guarantee has been finely put by one who may a life-study of the problem. 'The modern theory, which has swept away every authority except that of the State, and has made the sovereign power irresistible by multiplying those who share it, is the enemy of the common freedom in which religious freedom is included.' (Acton, being a Roman Catholic, is especially interested in this application of the matter, but his example serves well as an illustration of the general situation.) 'It condemns, as a State within the State, every inner group and community, class or corporation, administering its own affairs; and, by proclaiming the abolition of privileges, it emancipates the subjects of every such authority in order to transfer them exclusively to its own. It recognises liberty only in the individual, because it is only in the individual that liberty can be separated from authority, and the right of conditional obedience deprived of the security of a limited command. Under its sway,

1. Sabine thus criticises Bosanquet's theory of liberty: 'While the theory goes definitely beyond the ready-made individual, it comes dangerously near to stopping with another ready-made entity, the social organisation. . . . Characteristically the emphasis of the idealists was upon the ethical necessity of finding a station in the objective order, as if the system were final while the individual is only casual. The argument starts from a sound principle, viz., the principle that ultimately the individual's claim to a right has to be judged in the light of the common good, but this does not really exclude the other principle, viz., that any organisation of the common good has also to give scope to individual accomplishment. Thus it is quite evident as a matter of history that many claims to rights have been made, and ultimately justified, the for the time being they were not recognised as contributory to the common good and were, on the contrary, subversive of the institutions in which the common good was then objectified. The point is that the common good is no more ultimate than individual good; discovery may change both.' 'Liberty and the Social System', op. cit., 668-9. Cf. Bradley, 'My Station and Its Duties', op. cit.

2. 'There is no people except the political community and the individual members of the same. All other assemblages for the most lawful purposes have no political voice whatever. They have a right to assemble, but they can decree nothing, they can only express an opinion.' Woolsey, op. cit., Vol.I, 206.

therefore, every man may profess his own religion more or less freely; but his own religion is not free to administer its own laws. In other words, religious profession is free, but Church government is controlled. And where ecclesiastical authority is restricted, religious liberty is virtually denied.'[1]

An insufficient psychological analysis is the chief cause of this position of the orthodox theorist. It arise, I am convinced, from a false view of liberty, and of its value. To Austin, the legalist of the Benthamite movement, liberty denoted absence of restraint; while to the Hegelian liberty is a discipline enforced by an ideal institution under which everyone and everything has the same and subordinate status. And these positions are in turn deduced from the assumption that the interests of the individual and of society are identical, and are expressed thru the state.[2] It is a curious combination of laissez-faire and étatisme,[3] which has resulted in a worship of uniformity.[4] Yet nothing is more self-evident than that an indiscriminate individualism is futile in the face of modern industrial conditions. Even when the state-organ tries to operate for the interests of all the citizens, giving preference to none, liberty is not the result. 'When you operate equality under the present industrial culture, discrimination inevitably follows. Hence the doctrine violates itself. Therefore the modern Jeffersonian invokes the democratic state to repress all tendencies to discrimination. But by this move, they also adopt a class, i.e., discriminatory interest.'[5]

1. Acton, op. cit., 151.

2. Cf. Kidd, op. cit., 116-7.

3. Cf. Laski, 'Democracy at the Crossroads', in Yale Review, Vol. IX., 795; Crely, 'Future of the State', op. cit., 182.

4. 'Society and the State are two different things. We have not only in society the State on one side, and the individual on the other; it is puerile to set the action of the former against the sole action of the latter.' Leroy-Beaulieu, op. cit., 51.

5. Crely, Promise of American Life, 190.

It is thus a vicious circle. Individualism and indivisibility are incompatible.

The truth is that centralisation of power kills initiative, and initiative is the clue to individuality.[1] 'Where power is concentrated in a few hands, there is lacking that spirit of responsibility without which no man can attain the full expression of his faculties. There is more than a negative danger in such concentration. . . . It deadens in any state the impulses which make for the greatness of a civilisation. . . . The real truth is that the members of a state are powerless against an efficient centralisation wielded in the interest of any social fragment, however large. It prevents the balance of associations which is the safeguard of liberty. It secures uniformity which, from the very constitution of human nature, liberty is the direct antithesis. For where the creative impulses of men are given full play, there is bound to be diversity, and diversity provokes, in its presence, a decentralised organisation to support it. That is why the secret of liberty is the division of power.'[2]

Such is the method of approach of the critic. For him, 'individuality, provided it be in harness, is the life of institutions, all vigor and adaptability depending upon it.'[3] For him there is nothing irreconcilable between the liberty of the individual and his restraint by institutions, an antithesis

1. 'The true democratic principle, that none shall have power over the people, is taken to mean that none shall be able to restrain or elude its power. The true democratic principle, that the people shall not be made to do what it does not like, is taken to mean that it shall never be required to tolerate what it does not like. The true democratic principle, that every man's free will shall be as unfettered as possible, is taken to mean that the free will of the collective people (sic) shall be fettered in nothing. Religious toleration, judicial independence, dread of centralisation, jealousy of State interference, become obstacles to freedom instead of safeguards, when the centralised force of the State is wielded by the hands of the people.' Acton, op. cit., 93-4.

2. Laski, 'Problem of Administrative Areas', in Smith College Studies in History, Vol. IV., 50-1.

3. Cooley, op. cit., 324.

which the orthodox theorist subconsciously believed to exist, and which he tried either to explain away by a transcendental theory of human nature, (in which he omitted half the truth) or to lessen by an emphasis on the principle of equality, a conception derived from that of the "sovereign people". The critic believes that such a principle is insufficient,[1] that 'the public interest is to be asserted, not merely by equalising individual rights, but by controlling individuals in the exercise of those rights.'[2] The critic recognises that 'social types of behavior are indispensable to individual growth',[3] and that every organisation implies obedience.'[4]

With the recognition of the necessity of organisation and of power therein, the critic insists upon the freedom of the individual. But the significant point here to bear in mind is that for the critic, individual freedom is freedom organised. 'Liberty is not in itself a positive principle of social organisation,'[5] and to ask for liberty as such would be to revert to the condition anathematised by Acton.[6] Hence the problem of freedom is, in Laski's phrase, one of division of power,[7] or of administration and correlation.[8]

To secure the desired freedom, the necessary expression, men associate

1. Sabine, 'Liberty and the Social System', op. cit., 674.

2. Croly, Promise of American Life, 190.

3. Sabine, 'Liberty and the Social System', op. cit., 674.

4. Bryce, op. cit., 486.

5. de Maeztu, Authority Liberty and Function, 192.

6. Supra, p. 74-5.

7. Supra, p. 77.

8. 'The organisation of freedom in Society consists in securing two things, first, the best and most perfect relationship of institutions within the Commonwealth; and, secondly, the most perfect subordination of all institutions to the expression of the wills of the individuals whom they exist to express.' Cole, Labour in the Commonwealth, 200.

in groups having a common purpose. 'The end of the association is not the association, but those things which the association proposes to itself.'[1] The creation of an association has therefore a functional necessity; but this means that there will be as many associations as there are common purposes, that one institution cannot absorb all the interests of men.[2] 'The necessities of social life cannot be satisfied in a single vast community of all men. Within the widened community there must always remain the numerous likenesses and differences of social groups. . . . These necessitate nearer centers of social activity, nearer entities. Further, the activities of men are determined by the necessities and limitations of loyalty, so that each area requires its own autonomy. Decentralisation is as necessary as centralisation. . .'[3] Thus we reach the conclusion, thru a psychological analysis, that the state is only one form of political entity,[4] that 'popular sovereignty' cannot be organised under an absolute and absorptive state. To attain real freedom, the diversity of interests of men must be recognised, and, what is more, must be given institutional expression.[5] 'Self-assertion thru voluntary or-

1. de Maeztu, op. cit., 251.

2. 'In the primitive world a single set of institutions inclosed the life of a people. It was then easy to find a simple external sanction for all conduct. As community develops it unfolds within itself many associations, and these all build their own institutions and call with many voices to many allegiances. Thus the social being can no longer find the unity of his life in the mere acceptance of any single social claim, but only in so far as these various claims have been related and harmonised in the focus of his own responsive personality.' MacIver, Community, 161.

3. Ibid., 284; cf. Cole, Labour in the Commonwealth, 57.

4. Cf. Wallas, op. cit., 81.

5. 'An important part of the true freedom of its citizens lies in the pursuit of ends not political, and essentially transcending the limits of any particular state, since they are conceived as good for men as men. In the pursuit of such ends, they organise themselves in societies not identical with the state, and which ought to be independent of it. So organising themselves, they work out their concrete freedom. . .' Hollands, 'Nature, Reason, and State Authority', in Philosophical Review, Vol. XXV, 660.

ganisation is of the essence of democracy.'[1]

The significance of such associations is seen from two angles. In the first place, the creative impulses of men can best find satisfaction thru voluntary organisations. In the second place, men will give their allegiance only to these institutions which fulfill their desires.

In the owrds of an eminent sociologist,[2] 'community is the common life of beings who are guided from within, actively, spontaneously, and freely relating themselves to one another. . . . But the State works with an instrument which is necessarily formal, proscribing the general external conditions of social life. . . . Its instrument resembles no "leaden rule" which can adapt itself to the actual mouldings of the social structure, but an unbending rod which can measure only its general outlines.' 'Since the State is an organ of authority, which uses of constraint or the threat of it, wherever equivalent results, or nearly so, can be attained by the method of liberty, this method ought to have the preference.'[3] The state, by its nature, does not provide the primary outlet for the impulses of the social man.[4] It is predominantly a regulative organ, not creative.[5] Leroy-Beaulieu, speaking on this point, says:[6] 'I examine what we are all agreed in calling the great achievements of contemporary civilisation; and I find that three-fourths, if

1. Cooley, op. cit., 288.

2. MacIver, Community, 34.

3. Leroy-Beaulieu, op. cit., 149.

4. 'From the very fact that the State is so absolutely destitute of the faculty of invention, . . . it follows that the State cannot be the first agent, the primary cause of progress in human society.' Ibid., 90-1.

5. Ibid., 90.

6. Ibid., 53.

not nine-tenths of them, have been effected by these various collective agencies wielding no coercive force of any kind.' 'So far from the State being the origin of all great works of general utility, it can be shown from history that free associations have constantly lent their machinery to the State for those services which do most unmistakably develve upon it.'[1]

The voluntary association, on the other hand, is by nature conducive to human achievement and initiative. 'The primary incentive to co-operation is a spontaneous attempt to make efficacious the social will of individuals striving for a definite goal. Whatever tends to organise this will is an instrument of progress. And on the face of it, a flexible system of organisations and institutions, if propoerly co-ordinated, will promote the interests of society more than can one dominant, inflexible organisation, such as the state.[2] Pregress requires social mobility, and when the state is commensurate with social space, ther can be little motion. 'It is better that life and initiative should be diffused thruout the social body than that it should be concentrated in a single organ which wields an unlimited power of constraint.'[3] It is for this reason that the right of free association should be recognised. 'By virtue of its superiority from the point of view of conception, invention, and aptitude for frequent modification, or varied experiments, individual action should be preferred to that of the State. . .'[4]

1. Ibid., 81. 'The State is in the dilemma of fearing to nationalise because it mistrusts its own capacity, and yet of being wholly unable to interfere successfully without nationalising, as well as utterly impotent to refrain from interference. The State that cannot save itself is not likely at present to save the worker, who is therefore driven back upon himself, and forced to find his salvation in the development of his own institutions.' Cole, World of Labour, 14.

2. 'By public will we understand the deliberate self-direction of any social group.' 'And we may naturally expect it to progress rather by the quickening and co-ordination of many agencies than by the aggrandisement of any particular one.' Cooley, op. cit., 395, 402.

3. Leroy-Beaulieu, op. cit., 150; cf., ibid., 49-51 sqq.

4. Ibid., 147. 'However beneficial may be the consequence of social legis-

'The state is thus determinate, a closed organisation of social life; while society is indeterminate, an ever-evolving system spreading beyond and only partially controlled by the definite net-work of the state.'[1] 'The state only becomes a dynamic, progressive, and cultural agent when it is actually felt and understood by the majority of its citizens. In other words, when it and its purposes are consciously accessible to the majority of its citizens; . . . when it ceases to be a repressive police-organ; when it controls thru the lure of constructive, forward-reaching policies and not thru forcing men into the mold of the past; when its expression thru government is fully representative and not the secret, crafty, narrow machinations of a small dominating caste or class.'[2] And in so far as the state fails to achieve its end, it will not in the long run receive the loyalty of its members. No doubt the state may have in most cases the benefit of the boubt; obedience is based largely upon a subconscious sense of utility,[3] and in times of crisis may

lation, -- and that a large part of it does confer benefit is unquestionable, -- it does not compensate for improvements wrought out with their own minds by those upon whom the benefit is conferred.' Laski, 'Problem of Administrative Areas', op. cit., 15. Note that Leroy-Beaulieu and his fellow pluralists do not intend to substitute the individualist action of the laissez-faire school, but organised action. 'An economic organisation framed in the national interest would conform to the same principles as a political organisation framed in the national interest. It would stimulate the peculiarly efficient individual by offering him opportunities for work commensurate with his abilities and training. . .' Croly, Promise of American Life, 368. 'The right of free association is a most important factor in the development of community, and of the State. It mediates between the necessity of political government and the casualness of wholly unregulated social relations. It ensures the expression and furtherance of those specialised interests of culture and doctrine, of art and science . . . . It saves the State from the alternatives of stagnation and arbitrary control. It provides a ground for endless experiments in social organisation. The voluntary association leads the way, the State follows, often taking over the organisation of those voluntary associations which have bravely but inadequately endeavored to supply a universal or necessary service. . .' MacIver, Community, 41.

1. MacIver, 'Society and State', op. cit., 40.

2. Todd, op. cit., 345.

3. Cf. Brown, Austinian Theory of Law, 198; Bryce, 'Essay on Obedience', in his Studies.

render to the state their loyalty.[1] Yet obedience is also based upon consent, and the problem of obedience is always to be solved by a balancing of values. All organisations are subject to an ethical judgment which considers not only the purpose, but the service of the institution. 'No social claim is absolute. . . . No one form of society is adequate to the fulfillment of personality.'[2]

'Immanent in men . . . is the capacity of many devotions,'[3] whose number will be proportionate with the number of organised interests in society, and to whose intensity will correspond the richness of life. Only by such an hypothesis is it possible to regard contemporaneous civilisation as better than a preceeding one in which the interests of men were less wide. But if this is true, the myriad associations within the circumference of the given society have a legitimate value as such, and a psychological advantage over the state. For the large association, the it gains in power and represents wider interests, loses in some degree the emotional attachment of its members. Administration requires mechanisation, and mechanisation blurs in the individual member the sense of intimate relationship.[4] 'In small groups the requirements of structure are so simple as to make little trouble, but in proportion as the web of relations extends and diversifies, they become more and

1. 'The sovereign is the person in the State who can get his will accepted, who so dominates over his fellows as to blend their wills with his. Clearly there is nothing absolute and unqualified about it. It is a matter of degree and not of kind that the State should find for its decrees more usual acceptance than that of any other association. It is not because of the force that lies behind its will, but because men know that the group could not endure if every disagreement a secession, that they agree to accept its will as made manifest for the most part in its law.' Laski, Problem of Sovereignty, 17. Cf. Cole, Labour in the Commonwealth, 50.

2. MacIver, Community, 301.

3. Ibid., 279.

4. 'The nearness of the whole to the will of the members is psychical, not spatial.' Cooley, op. cit., 407. For brilliant treatment of this subject, cf. Wallas, Great Society, and MacIver, Community, passim.

more difficult to meet without sacrificing human nature; so that, other things equal,[1] the freedom and real unity of the system are likely to vary inversely with its extent.'[2]

The complementary principle is that the smaller associations are able to satisfy human needs, and to receive therefore human loyalty, which the state can neither satisfy nor receive.[3] If the attempt is made by the state to supply such needs, society has sacrificed intensity for efficiency;[4] and this efficiency can be only temporary, for the nature of man will ultimately rebel.[5] If the state tries to satisfy all the needs of man, it has created for itself a dilemma that may be solved only by a delimitation of function.

B. State Province and State Function.

'Left to themselves, the natural tendencies of states are likely to be exclusive; while the natural relations of national cultures are those of mutual modification by free interaction and exchange. The sole direct function of the political organisation, the state, is to assure the security and freedom of its citizens; other ends it may assist in securing, if public opinion

1. The 'instinct' of patriotism must here be recognised as a powerful distraction from the principle. Cf, Veblen, The Nature of Peace.

2. Cooley, op. cit., 54.

3. 'It is a mistake to regard community in an exteranl way. In space . . . the larger circle includes the lesser, but in the world of community it is the near relations which includes the wider.' MacIver, Community, 319.

4. 'If needs essentially universal find their purer form in the large community, there are more intimate needs, needs more deeply rooted in the emotional nature, which it cannot satisfy. It cannot take the place of the neared community, but can only supplement it. In so far as it becomes a substitute for the near community, men have found one good at the cost of another.' Ibid, 252-3.

5. Cf. Laski, Authority in the Modern State, Ch. 1., passim.

approves, but they do not belong to it of its own essential nature.'[1] For, as even Bluntschli admits,[2] 'the State is an external organisation of the common life. . . . The State is wholly based upon the common nature of men, and especially of its own people. Therefore it cannot control private life in what is essentially individual.' It follows that the state 'cannot base any claim to sovereignty on the fact that everyone has to belong to it. For tho it concerns everyone, it is very far from concerning, or expressing, the whole of everyone. . . . Institutions cannot substitute themselves for human wills by right, althe they continually attempt to do so in fact. Institutions possess validity and impose obligations only in so far as they express purposes common to groups of individuals. They are an extension of the means of expression employed by individual wills, and as soon as they pass beyond this function, and try to substitute themselves for individual wills, they can claim no right. . .'[3] 'The State is no doubt a regulating and a co-operating apparatus for certain essential functions. But it is not the only, nor even (a priori) the principal and superior organ of thought and movement in Society.'[4]

In accordance with such a functional survey, 'each form of association has its distinctive place and character which cannot without social loss be usurped by any other association.'[5] As civilisation becomes more and more

1. Hollands, 'Nature, Reason, and State Authority', op. cit., 660.

2. Bluntschli, op. cit., 304; 'The modern State has become conscious of the limits of its power, and its rights. It considers itself essentially a legal and political community. It gives up its claim to dominate religion and worship, and leaves freedom both to churches and individuals. The modern State claim no scientific and no artistic authority, it esteems and protects freedom of scientific inquiry and of expression of opinion.' Ibid., 56. This is of course antithetic to his theory, and, because of his conception of 'freedom', means much less than it appears to say.

3. Cole, Labour in the Commonwealth, 205-6.

4. Leroy-Beaulieu, op. cit., 49.

5. MacIver, Community, 243.

complex men find ever new means of expression for legitimate interests. This implies a lessening province for the state. 'The more self-expression there is in other spheres of life, the less need, relatively, people will feel of acting thru government. . .'[1] Such a view is the reverse of that of the orthodox theorists. For they, proceeding under the rationalistic interpretation of human nature, and the doctrine of national sovereignty, felt that the increase of social interests would d mand a proportionate increase of state functions.[2] Espousing the laudable aim that the state is to promote the public welfare, they drew the non sequitur that public welfare could be achieved only by state interference.[3] It is a non sequitur because 'to nationalise a people has never meant merely to centralise their government.'[4] Such a deduction comes from an hypostatisation of the state into an end-in-itself. It is

1. Cooley, op. cit., 409. He continues: 'a principle which should remind those who dread the growth of the latter that the only sure way to restrict it is by developing a real affirmative freedom in other relations.'

2. 'We are beginning to find out that the powers of gas and water companies and the relations between landlord and tenant, between employer and employed, nay, even between parent and child, frequently need State interference in the interest of individual freedom.' Ritchie, op. cit., 95. 'The State can extend its administrative care, and therefore its influence, beyond the domain of judicial organisation, but it has then no power of compulsion, and its functions are limited to the support and encouragement of important social objects for which the State help is needed. . . . The care of the State for the national welfare is here expanded into a care for the welfare of society, but only because the latter is in need of assistance.' Bluntschli, op. cit., 305-6. The influence of laissez-faire and the knowledge of inherent capacity in the state, are here evident.

3. Ibid., 299. Writing in 1918, one member of this school says: 'Summarising the economic situation as it confronts the people, we recognise that new economic functions of the State will be needed to meet the demands of the situation. . . . This being the situation, the disposition . . . to give the go-by to the State, as a capitalist instrument, and to fall back upon new plans of co-operation, trade-unionism, syndicalism, or gild Socialism, in which the State either plays no part or one of relative unimportance, is seen to be as indefensible as the disposition to reject the movement towards increased productivity. Whatever may be the vices of a capitalistic State, there is only one remedy, to convert it into a democratic State.' Hobson, op. cit., 180. He fails to realise that those who give the 'go-by' do so to make the state democratic.

4. Crely, Promise of American Life, 273.

also due to the assumption that all general interests can, nay, must be effectuated by the one organ, the national government. But 'the process of centralisation is not, like the process of nationalisation, an essentially formative and enlightening political transformation.'[1] Centralisation, as we have already indicated, implies ossification, mechanisation. There is a point of diminishing returns in the administrative process.[2] When this point has been reached, further centralisation means disintegration of the social complex and relaxation of social efficiency.

It is thus 'a false inference if we say that because the state has control over every other association, therefore all other associations are absorbed into the State, or are completely circumscribed by its frontiers.'[3] 'Because a group or an individual is related to some other group or individual it is not thereby forced to enter into relations with every other part of the body politic.'[4] Sovereignty, then, assumes a different aspect; it is no longer monistic and comprehensive in its jurisdiction, but rather an attribute that can and should be possessed by every organisation functioning for a social interest. As Bryce[5] and Lowell[6] have pointed out, legal sovereignty is divisible on a basis of function. Practical sovereignty now divides in a simi-

1. Ibid., 273.

2. Laski, Problem of Sovereignty, 284. 'Social consolidation is . . . not a simple problem, for social consolidation implies an equivalent capacity for administration. I take it to be an axiom, that perfection in administration must be commensurate to the bulk and momentum of the mass to be administered, otherwise the centrifugal will overcome the centripetal force, and the mass will degenerate. In other words, civilisation would dissolve. It is in dealing with administration, as I apprehend, that civilisations have usually broken down, for it has been on administrative difficulties that revolutions have for the most part intervened.' Adams, op. cit., 204-5.

3. MacIver, Community, 30.

4. Laski, Problem of Sovereignty, 10.

5. 'Legal sovereignty is divisible.' Bryce, op. cit., 520.

6. Lowell, op. cit., 216.

lar fashion. 'It may be so far divided that men obey one ruler in one sphere of action and another in another sphere.'[1] 'Politically, there is no such thing as sovereignty at all.' The political philosopher will find himself, rather, in the presence of different wills, some of which, from their strength, have more importance than others. He will ascribe to none a moral pre-eminence by the mere reason that it claims political priority.'[2] Moral achievement being the criterion for vesting an institution with the attribute of political power over its members, 'you must on this view admit that the State is only one of the associations to which a man happens to belong,'[3] and that every association is a limitation upon the sovereignty of the national organ.[4]

The problem therefore becomes 'a problem of the reconciliation of allegiances, not of the reduction of all allegiances to one.'[5] The conservative Dicey phrases it thus:[6] 'How can the right of combined action be curtailed without depriving individual liberty of half its value; how can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the Government?' 'On such a view the adjustment of authorities becomes difficult; but it is far better to have such a recurrent problem than state tyranny within society.'[7]

1. Bryce, op. cit., 521.

2. Laski, 'Theory of Popular Sovereignty', op. cit., Vol. XVII., 214.

3. Laski, Problem of Sovereignty, 19.

4. Cf. Faguet, op. cit., 196 sqq., where he admits that associations limit sovereignty, but thinks it 'an absurd and monstrous incongruity'. For 'in fact there can be only one association, the association of the nation, otherwise the sovereignty of the nation is limited, that is, destroyed. . .'

5. MacIver, Community, 282.

6. Dicey, Law and Opinion in England, 466.

7. Hollands, 'Nature, Reason, and State Authority', op. cit., 660.

'That which most inwardly distinguishes modern life from ancient or mediaeval is the conscious power of the common people trying to effectuate their instincts.'[1] To some such principle we must hold if we are to preserve the democratic synthesis. If popular sovereignty then means anything, it means a necessary distribution of power.[2] For the state, as we have suggested, is not a creative organ. 'It is an organ of criticism, an organ of generalisation, co-ordination, vulgarisation. It is above all, an organ of conservation. The State is a copyist. . .'[3] If the vital spring of individual initiative is to be retained in modern society, if personal freedom is to remain, power must be distributed. But such distribution must be not for the purpose of the emasculation of power, but for the purpose of its moralisation. 'An effective supplementary method of co-ordination is, therefore, equally necessary.'[4]

The demands of liberty and of administrative efficiency, therefore, point to a federal solution.[5] Power cannot be moralised until the citizen is given real freedom to disobey, to examine the foundations of the claim of the state to loyalty; and this meanetes a federal system. Legal power will not be real power, effective power, unless it corresponds with social interests; and this, too, presages federalism. The vice of the Hegelian state is that it may lead to unlimited state regimentation of life, with no recognition of the 'instinct of workmanship' in man. It gave no limit to power, and statesmen 'reasoned as if the State-instrumentalities had intrinsic power, which

1. Cooley, op. cit., 118.

2. Croly, Progressive Democracy, 229.

3. Leroy-Beaulieu, op. cit., 90.

4. Croly, Progressive Democracy, 229.

5. Cf. MacIver, Community; Leroy, op. cit.; Cole, op. cit.; de Maeztu, op. cit.; Laski, op. cit., etc.

they have not, and as tho the feeling which creates them had not intrinsic power, which it has.'[1] There was thus in their system no understanding of the nature of power, no attempt to analyse the significance of authority.[2] The orthodox theorists preceeded on the assumption that force was a simple matter of fact,[3] and disregarded the psychology of it, and hence the reality of it in social relations other than that imposed by the state.[4]

'The social problem is the problem of preventing such divisions (of interest as are visible in any developed community) from dissolving the society into which they enter, -- of keeping such a highly differentiated society fundamentally sound and whole.'[5] The assumptions of the older theorists will not serve. An omnipotent sovereign is mythical here. Even Dicey recognises the existence of associations possessed of power,[6] while Willoughby is forced

1. Spencer, op. cit., 330.

2. 'The fact is that to many of those who are engaged in the task of government, the problem of authority is either unknown, or is unconsciously set in terms of the status quo.' Laski, Authority, 51. A major criticism of the pluralist doctrine is that it has likewise failed; cf. Sabine, 'Authority in the Modern State', in Philosophical Review, Vol. XXIX, 276 sqq. Its validity will be seen as we progress.

3. Or have deduced it from legal presumptions.

4. MacIver has done good work on this problem. He sums up the situation, from one facet, as follows: 'As community differentiates, the place of force becomes narrowed. Force remains effective against isolated individuals or small minorities. . . . But force cannot be effectual against the great and growing non-political associations within community, and the large political groups and oppositions which majority rule engenders. Here there is no hope for community, and for the State to which it surrenders the right of force, except in the development of the sense of obligation.' Community, 306.

5. Crely, Promise of American Life, 139. He finds the solution, significantly enough, in 'the substitution of a conscious social ideal for the earlier instinctive homogeneity of the American nation.' Ibid.

6. 'In almost every country some forms of association force upon public attention the practical difficulty of so regulating the right of association that its exercise may neither trench upon each citizen's individual freedom nor shake the supreme authority of the State.' Dicey, Law and Opinion, 465. Dicey is of course unable, because of his premises, to offer federalism as a solution.

to a timid and perverted admission of heterogeneity of interests in society.[1]

Once again we must insist that the true principle is federal, 'a common organisation for common interests, special organisations for special interests, centralisation for universal order and security, decentralisation for the fulfillment of life.'[2] 'The essential functions of the State spring out of its very nature. One of its characteristic features is to represent the universality of the territory and its inhabitants, to have a thought and action which can everywhere make itself obeyed, by the aid of force if need be. From this it follows that the State is charged to provide for the common wants of the nation; for those, that is, which cannot be suitably provided for under a regime of private initiative, and which demand, as an essential preliminary, the absolute concurrence of all citizens.'[3] 'The fact that the work is deemed necessary and that there is no other adequate way of doing it is the real basis of most state functions.'[4]

Hence there is a prima facie case for individual or group action, as against that of the organ of compulsion and of generality. 'Society is a plastic being which enjoys a marvellous facility for adapting itself to its environment, and for creating those organs which are indispensable to its preservation, . . . so long as society is left to its natural plasticity, and is not crushed by authoritative force, that is, by the apparatus of constraint which we call the State.'[5] Free association is thus essential to the

1. Cf., e.g., Social Justice, 222. 'We can decrease socio-political restraints only as we harmonise interests.'

2. MacIver, Community, 284.

3. Leroy-Beaulieu, op. cit., 156-7.

4. Cooley, op. cit., 406.

5. Leroy-Beaulieu, op. cit., 69-70. Acton has a fine passage that is relevant. 'No power can so efficiently resist the tendencies of centralisation, of corruption, and of absolutism, as the community which is the vastest that

vitality of society and to the continuance of its unity of purpose. 'All associations are alike organs of community, but the State becomes the coordinating organ of them all.'[1] With such a delimitation of function, 'there is no contradiction between the completest activity of the smaller and of the greater community.'[2] Thus the values peculiar to each type of organisation may be preserved. If the state tries to do more, to dominate the subsidiary associations, this condition of stable equilibrium is ended, and the process of social development is arrested. There is sacrificed in the name of a wrong conception of social unity, the many-sidedness of social life. For when one association makes its single principle the rule of all, the true character of all other associations is obscured.'[3]

C. Remains of the Orthodox Theory.

John Dewey has posited the query which the critics of the orthodox conception have attempted to answer. He asks[4] if there can be 'any alternative between a theory like Austin's, which, placing sovereignty in a part of society, makes government an entity per se, whose operations are all commands, and a theory which finds the residence of sovereignty in the whole complex of social activities, thus making government an organ -- an organ the more efficient

can be included in a State, which imposes on its members a consistent similarity of character, interest, and opinion, and which arrests the action of the sovereign by the influence of a divided patriotism. . . . It provides against the servility which flourishes under the shadow of a single authority, by balancing interests, multiplying associations, and giving to the subject the restraint and support of a combined opinion. In the same way, it promotes independence by forming definite groups of public opinion, and by affording a great source and center of political sentiments, and of notions of duty not derived from the sovereign will. . .' Op. cit., 289.

1. MacIver, Community, 130.

2. Ibid., 256.

3. Ibid., 244.

4. Dewey, 'Austin's Theory of Sovereignty', in Political Science Quarterly, Vol. IX., 51.

just in proportion as it is not an entity per se, but is flexible and responsive to the social whole?' The critics answer by the principle that 'society and all its members, and all the purposes for which it is constituted, are to be regarded in the last resort as standing in subordinate relationship to ends and principles which transcend the limits of political consciousness.'[1] And their method of criticism is pragmatism: 'We have to decide what we mean the state to do before we pronounce that what it does is good.'[2]

Their philosophy therefore demands at the start that they abandon the metaphysical reasoning of the orthodox theorists. The constructions of Austin and Bluntschli, Bosanquet and Willoughby, are for them simply inane.[3] Nay, they are worse; they are not solely the innocuous vagaries of 'theoriciens'; they are positively vicious.[4] Their state is dangerous because it is too powerful and too inclusive of human interests, and because it is too timid and dilatory.[5] On the one hand, it insists upon unity of allegiance and denies reality to other human fellowships,[6] and on the other, it can not and dare not perform many necessary social functions. It both curbs liberty and

1. Kidd, op. cit., 112.

2. Laski, 'Problem of Administrative Areas', op. cit., 63.

3. 'Ces explications ressemblent a celles des anciens psychologues, qui, pour rendre raison des phenomenenes d'ordre psychologique, placaient derrierre eux une substance pensante qu'on appelait l'ame. Les theoriciens politiques, pour justifier un etat de fait, la force gouvernante, affirment l'existence derrierre elle d'une substance souveraine, la personnalite de la nation.' Duguit, Le Droit Social, 27-8.

4. 'Tel le regime politique issu du droit romain et acheve par le Revolution. Mais cette forme d'Etat, les hommes du XXe siecle n'en veulent pas. Ils n'en veulent plus parce qu'elle repose sur un dogme et qu'ils ne croient plus aux dogmes d'aucune espece. Ils n'en veulent plus parce qu'elle est un instrument de domination et qu'elle peut a tout moment devenir une tyrannie.' Ibid., 40.

5. 'In spite of all that the secular state has accomplished for civilisation during its period of supremacy, it is proving to be an unnecessarily powerful and dangerous servant and an unnecessarily jealous master. . .' Croly, 'Future of the State', op. cit., 1005. Cf. Acton, op. cit., 64-5.

6. Laski, Problem of Sovereignty, 67.

retards the process of evolution which demands increasing efficiency of social organisation. But the crux of the evil is the pretension to moral right which the state assumes thru the metaphysical haze of the "general will" and "popular sovereignty".

'The truth surely is that we have evolved the great society without any safeguards that our political institutions would keep pace with the changes in social and economic structure.'[1] 'The community, as it consolidates, finds it essential to its safety to withdraw, more or less completely, from individuals, and to monopolise, more or less strictly, itself, a great variety of functions.'[2] But operation under the orthodox theory does not successfully effectuate this progress transition. That theory 'can only grasp the shadow while the substance eludes it, only the mechanism whose informing spirit it cannot hold.'[3] For under it the state is omnipresent, and there results a confusion of interests, whence emerges a class domination, employing the coercive organ for special purposes. From this factual position, the critic proceeds to develop a new synthesis.[4]

His desire is two-fold: to find a solid basis for individual freedom, and to establish competent institutions of social control.[5] And, largely

1. Laski, 'Problem of Administrative Areas', op. cit., 8.

2. Adams, op. cit., 19-20.

3. Cole, World of Labour, 19.

4. A sociologist thus phrases it: 'It is along the line where the ethical phenomena, proceeding from the existence in men's minds of the sense of responsibility to principles transcending the conception of the State, have come into conflict with occupying interests, sheltering themselves behind the State, that the stress of the forward movement is developing itself in modern politics.' Kidd, op. cit., 371.

5. 'Le probleme ne peut etre que dans les termes suivants: trouver une organisation telle que, spontanement, par necessite interieure, les administrations agissent avec intelligence, competence, initiative, vivacite. Ces termes imposent la solution: si la hierarchie beaureaucratique a ete incapable de nous fournir cette spontaneite d'intelligence, de competence d'iniative, de vivacite,

because his mind is saturated with modern psychology, he finds the answer in a recognition of 'free associations' within society. These associations tend to fulfill both requirements, that of individual liberty and that of administrative achievement.[1] 'Freedom being impossible without group orgainsation,'[2] the sense of corporate unity which arises in such groups is not antagonistic to the individual, but on the other hand is a further expression of the individual. Moreover, these smaller associations preserve to the greatest possible extent the initiative necessary for progress, and also serve as a buffer against the coercive state-organ. For while all associations inevitably develop institutions of social control, the associations must be founded on like interests if these institutions are to be beneficent. This means that all associations within society must be judged by their functioning, and that the state cannot undertake to govern interests irrelevant to its end. Thus the evils of centralised administration are avoided, a federalism is seen to be the clue for reorganisation.[3] With delimitation of power there must go delimitation of function.

The pluralistic theory has, therefore, a definite credo. Laski thus states it:[4] 'It denies the rightness of force. It dissolves the inherent

ne semble-t-il pas s'imposer de laisser le champ libre a la liberte et a la capacite technique?' Leroy, op. cit., 261.

1. 'This kind of cleavage which is gradually made between the prerogatives of the State and those of the free society has for its object to leave more leisure to individuals for their private tasks, and at the same time to secure the better organisation of certain services.' Leroy-Beaulieu, op. cit., 75-6.

2. Cooley, op. cit., 284. 'Liberty provokes diversity, and diversity preserves liberty by supplying the means of organisation.' Acton, op. cit., 289.

3. 'Le federalisme autarchique en se developpant contre l'Etat, puissance regalienne, substituera a ses methodes, des methodes de liberte et de competence, fermement maintenues par l'egalite economique. A un moment de cette revolution, la tradition cedera; alors il n'y aura plus l'Etat au sens ou nous l'entendons, adosse a une tradition plusieurs fois seculaire de monarchie; il y aura un gouvernement professionel du type de celui qu'a prevu Proudhon. . .' Leroy, op. cit., 277.

4. Laski, Problem of Sovereignty, 23.

claim of the State to obedience. It insists that the State, like every other association, shall prove itself by what it achieves. It sets groups competing against groups in a ceaseless striving of progressive expansion. . . . It makes claim of the member of the State that he undertake ceaseless examination of its moral foundations. It does not try to work out with tedious elaboration the respective spheres of State or group or individual. It leaves that to the test of the event. . . . It recognises the validity of all wills to exist, and argues no more than that in their conflict men should give their allegiance to that which is possessed of superior moral purpose.'

Obviously, this is something other than the orthodox conception. Here sovereignty is a matter of fact, a power of will which may or may not receive obedience, depending upon the autonomous consent of men. The state is here no longer even legally omnipotent; nor is it the exclusive association in society. Law is here a condition of politics, rather than a self-created end. It possesses a sanction only in individual wills, and in so far as it embodies a legitimate and appealing moral purpose. The end of the state is still the general welfare, but that phrase has undergone a scrutiny which deprives the government of much of its prestige. Hereafter the purpose of an association or of an institution is insufficient; the process employed is also subject to analysis. In short, the Hegelian structure falls before as attack based on a purview of its historic role and achievement, and a more complete understanding of the nature and demands of human nature.

Chapter V.

THE BASIS OF RECONSTRUCTION.

There remains the task of indicating a few of the concrete changes involved in the pluralistic approach to the theory of the state. More than indication is impossible, for, as the method employed gives evidence, institutional developments are to occur spontaneously, and not wholly according to an a priori synthesis. Freedom and efficiency are to be gained by a process of trial and error, even tho that process rests upon certain principles previously elaborated. But there are phases of the theory which will bear some additional scrutiny, and these we shall consider for a moment.

A. Rights and State Responsibility.

According to the orthodox theory, the question of rights is a simple matter. 'A party has a legal right when another or others are forced or obliged by the law to do or forbear towards or in regard of him.'[1] This is the language of Austin. The state is here the sole creator of rights, and may create or refrain from creation, at its sovereign pleasure. Above all individuals, who stand on a uniform plane of subjection to its mandates, is the state. The state, therefore, must be above the law, for to subject it to its own commands is an impossible and an inconceivable thing. The sovereign, hence, is not the subject of rights and duties; tho it may, by an act of grace, allow remedies against itself on occasion.

Such a theory of rights arose largely as a reaction from the metaphysical natural rights of earlier times. Right was then conceived as inherent in personality. It was a possession that could be relinquished only volun-

1. Brown, Austinian Theory of Law, 193.

tarily. With the Revolution this conception was transferred to the democratic state. With Locke and Rousseau the individual is made to surrender certain of his 'natural' rights to the governing organ; this latter has henceforth supreme control over the individual in these fields. Law is founded upon the individual components of the state, which becomes the sole adjudicating authority. With the development and synthesising of the orthodox theory, the state thus comes to possess complete legal power over all subject individuals; and when carried to an extreme, as in Hegel and his disciples, morality and legality become synonomous terms. Liberty means subjection to law. What the state promulgates is not only lex, but also ius.[1]

The derivative of this situation, a derivative compelled largely by the exigencies of national development, is the doctrine of the irresponsibility of the state. Both because the theory seemed to require an organ of government above the ordinary law, and because the industrial changes of the nineteenth century strained the eighteenth century categories of law, the state came to possess a power of its own, similar to the imperial rights of a former era. The orthodox theory in this regard has been concisely put by Moore, speaking of France:[2] 'Acts of public power done bona fide be any authority into whose department the matter would reasonably fall if the particular power existed, are not remediable in the judicial tribunals, tho such power does not in fact exist, or existing, has been in the particular case exceeded.'

There has been developed from these two positions a separation of law into public law and private law. Such a distinction has aided the orthodox theorists in their claim that the individual achieves real freedom by submit-

1. It is interesting to note that several commentators have suggested that many of Austin's lacunae and pedantic distinctions are due to a failure to comprehend the difference in these two words, a difference thru which the English language has long suffered.

2. Moore, op. cit., 97.

ting to the commands of the state.[1] They claim that every individual has here-in the same and as many rights as his neighbor, and thus a true equality is posited, an equality which can be maintained only by continued supervision and control by a supreme coercive authority, the state.

These refinements are rejected by the critic. For him, legal argument is useless, unless there is sociological vitality behind it. He questions, not so much the legal right as the labered interference of government in spheres where private initiative is socially valuable. 'We are, in fact,' says Laski,[2] 'beyond the sphere of law. We are dealing not with the conference of rights, but with their realisation, which is a very different matter.' The critic is therefore concerned with the purpose which is expressed in the exercise of the right. Right confers power, and it is the utility of this power that is scrutinised. The purpose of this power can never be 'a mere matter of declaration'[3] except in the eyes of the law. 'Purpose, in fact, must be discovered in pragmatic fashion, from the actual processes in their operation.'[4] Thus, when the pluralists speak of rights, they are thinking of them from a psychological point of view, and not from that of dry law.

'Our rights, therefore, are teleological. They have to prove themselves.'[5]

1. 'Man has his rights as an individual, private law is sharply distinguished from public law, and is rather recognised than created by the State, rather protected than commanded. The free person is not absorbed in the State, but develops himself independently, and exercises his rights, not according to the will of the sovereign State, but according to his own.' Bluntschli, op. cit., 56. This comes from a passage discussing individual freedom. My only conclusion that would be fair to the integrity of Bluntschli's mind, is that he is here dragging a red herring across the path leading to his major thesis, to throw his opponents off the scent.

2. Laski, 'Problem of Administrative Areas', op. cit., 31.

3. Ibid.

4. Ibid.

5. Laski, 'Sovereignty of the State', in Journal of Philosophy, Psychology, and Scientific Methods, Vol. XIII, 94.

'All rights under the law are functions in a democratic political organism and must be justified by their actual or presumable adequacy.'[1] The necessary implication is that all rights are of the same nature. If rights are based upon the function in the exercise of which they are tools, all rights are to be judged by the same standard, that of functional capacity.

From this is derived the theory of objective rights exploited by Duguit and de Maeztu. For them no one possesses rights because he possesses power. the old subjective rights are supplanted by rights based upon the relation of persons to institutions and associations; upon their status in a regime of functional operation. Rights arise, therefore, from the social position held by the given individual, and are his only so long as he performs his work in society. 'Nobody, either king or taxpayer, has more subjective rights than any other person (qua person). The legality or legal enforcement of the commands of a man with power should depend no longer upon any kind of personal right, but on the social function legally exercised by him. There would no longer be any personal rights, but the very conception of right would be inextricably united with function. . . . Where there is no function there would be no rights. . . . And in this society we should not discuss any longer the rights of the individual or the rights of the sovereign, for in this society nobody would have any right other than that of doing his duty.'[2]

Simultaneous with the rise of this concept, there has been a revival of 'natural law'. Dicey blames the wave of unconsidered democracy for the mass of foolish legislation annually excreted by the modern legislature.[3] Yet the movement is more than an application of the principle of vox populi vox Dei.

1. Croly, Premise of American Life, 278.
2. de Maeztu, op. cit., 139.
3. Dicey, Law of the Constitution, lxii.

It is due to a fear of vested interests, and is so wasteful because it is done under the guise of the doctrine of popular sovereignty. To check such an inundation, and to formulate a theoretic base for popular resistance,[1] Duguit has developed his 'jural principle'. All law must be in accord with this, to be law; otherwise it is mere vapid fulmination. Duguit attempts to found this principle on the social interdependence of men. But to do this, as de Maeztu has pointed out, posits another metaphysical basis for law. 'Objective right cannot arise from the fact that men have mutual need of one another. This fact can only originate rights of a trans-individual kind, not objective. . .'[2]

Yet there remains a domain of individual demand, which cannot be touched by law without harm to the purpose of the state and of society. Some of the elements of this region have been suggested by Laski; while Cohen has attempted to phrase the theoretical basis of such a 'natural law'. His argument is as follows,[3] 'While laws and government protection create legal rights, the effectiveness of this process depends on the recognition of previously existing fundamental psychic or social interests. To the extent that these interests exist and demand protection even prior to the specific law which meets their demand, they are the raw material of natural rights. There is no property . . . before the existence of . . . laws; but interests and claims do exist prior to and not as creatures of these laws which they call into being. The latter must justify themselves by the services they render to these and other interests.' Once again, the test is pragmatic.

From the above development it is clear that the governors enjoy no privi-

1. Duguit tries in vain to escape the fact that there is at least this one right in his new society. Everything may be 'duty', but there must be as a basis for duty the guarantee of a standard of living, and to this standard the people have a right. Cf. Laski's introduction to Law in the Modern State.

2. de Maeztu, op. cit., 249.

3. Cohen, 'Jus Naturale Redivivum', in Philosophical Review, Vol. XXV, 765.

leged position. They possess rights in accordance with their function, and that is the sum total of their rights. Similarly, the state has no subjective right.[1] Even the legal theory was willing to admit that 'the right of . . . doing acts without incurring liability therefor . . . is formal, not material.'[2] And this responsibility of the state is increasing daily.[3] There is, indeed, today no reason why such responsibility should not be extended. Even tho we cling to the doctrine of sovereignty, many of the functions today performed by the state are similar in kind to private undertakings, and should be subject to the same liabilities. 'However harsh the lack of relief, it is not illogical if and so far as damages for the sovereign's torts have to come out of the public treasury. But this last line breaks when the chain is stretched to include commercial transactions. . .'[4] For here the sovereign acts as a business man, and can shift the burden of liability to the consumer, even as he. Such responsibility, and even more, the courts are beginning to recognise,[5] and their recognition is hailed by the critic as an evidence that the old theory of sovereignty is breaking down in practice.

But the critic does not stop here. Under the conviction that 'whenever a single definite object is made the supreme end of the State, be it the advantage of a class, the safety or the power of the country, the greatest hap-

1. Cf. *infra*, Section E.

2. Bryce, *op. cit.*, 520.

3. Cf. Duguit, *Law in the Modern State*, Ch. VII.

4. Maguire, 'State Liability for Torts', in *Harvard Law Review*, Vol. XXX, 33.

5. 'It must be borne in mind that the local governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such for instance, as the construction of railways. . . . If, therefore, the maxim that "the King can do no wrong" were applied to Colonial governments . . . it would work much greater hardship than it does in England'. (1887, Farnell v. Bowman, L.R., 12 A.C., 643, 649). Quoted in Maguire, 'State Liability for Torts', *op. cit.*, 29.

piness of the greatest number, or the support of any speculative idea,'[1] liberty is endangered, the critic posits a further limitation of the public authority. This is the right of revolution, dear to the hearts of democrats. Yet 'in some arguments for democracy it seems to be implied . . . that when popular government is fully developed the right of insurrection must be held to have become obsolete; on the grounds that the resistance of any part of a community to the "will of the whole" mus be (1) immoral . . . and (2) futile. . . . In either argument there is an element of sound reason, but in both cases it is palpably inadequate to support the practical conclusion.'[2] It is the argument of the Hegelian, in whatever disguise, and proceeds from the same assumptions we have already seen to be unjustified. To the pluralist, there is always a chance of revolution; for the good of an institution is determined by its ability to satisfy the moral cravings of individuals; there is therefore always present the chance that enough people will become violently dissatisfied to overthrow the existing system. Far from considering this advice of his construction, the critic thinks it valuable, on much the same grounds as those held by Jefferson.

B. Group Autonomy.

It is this very fear of rebellion which makes the orthodox theorist insist upon unity of allegiance. And it is partly because they feel that this possibility of 'anarchy' should be lessened, that the critics insist upon the reality of lesser groups, groups other than the national government. 'The will of the State obtains pre-eminence over the wills of other groups exactly to the point where it is interpreted with sufficient wisdom to obtain general acceptance, and no further.'[3] And so long as the state insists upon exclusive

1. Acton, op. cit., 288.

2. Sidgwick, Elements of Politics, 618-9.

3. Laski, Problem of Sovereignty, 14.

powers and privileges this pre-eminence is going to be continually challenged.[1] For spontaneous groupings for common interests cannot be extinguished; it is part of the nature of man to associate in such a way. And 'with that independence which the regime of voluntary co-operation generates, there arises resistance not only to dictation by one man, and to dictation by a class, but even to dictation by a majority, when it restrains individual action in ways not necessary for maintaining harmonious social relations.'[2] Here is the danger, which is seen by both sides; but the orthodox theorists do not see, or are unwilling to admit, that the danger is due to the fact of oppression by the national organ. Remove that oppression, says the critic, and the danger would be lessened. In our present complex age, men are bound to associations by a multiplicity of allegiances,[3] and a recognition of the legitimacy of this federalistic condition would but multiply the restraints of conservatism.[4] Each association would hold a check upon the disjunctive desires of its members; and thru innumerable contractual relations based upon human interests, anarchy would be less possible than under the monistic state.[5]

This position the critic attempts to justify by an analysis of the nature

1. 'Everywhere we find groups within the state which challenge its supremacy.' Laski, 'Personality of Associations', in Harvard Law Review, Vol. XXIX, 425.

2. Spencer, op. cit., 655. Cf. Laski; 'Sometimes wills, whether individual or corporate, conflict, and only submission or trial of strength can decide which is superior. . .' Problem of Sovereignty, 270.

3. Ibid., 11-2.

4. Cf. MacIver, Community, passim.

5. 'L'association, on ne peut en douter, est "anarchique", comme l'ont dit tant de ministres; . . c'est la discussion, or, rien n'est pas plus contraire a l'obeissance; c'est le contrat, or, le contrat est la negation de l'autorite. Tout ce qui est contractuel va centre l'autorite qui, de nature, est unilaterale; l'autorite ne veut que monologuer; cela est de toute certitude. Le contrat, en effet, pose en principe l'egalite des parties et la reciprocite des prestations; le contrat, c'est la base du federalisme proudhonien, negateur de l'Etat, en meme temps que soutien de l'ordre.' Leroy, op. cit., 242.

of associations. To them every groups has a personality.[1] The association is a creative organ, not merely an administrative agency. It has a development of its own, a being and a becoming that cannot be controlled by the law. Law may recognise it, may modify its habits, but it is a thing in itself, and possesses a character of its own.[2] This personality is a matter of common experience. New York has for us a personality of its own; so has the University of Wisconsin. These are examples of the occurrence which Rousseau attempted to describe in his formula of association,[3] and they are numerous enough to demand significant treatment. For it is apparent that the state is but another example of the process.

Yet associations, corporations, groups, have won but a tardy recognition at the hands of the state; the modern struggle in France is typical, not unique.[4] In 1828 we find an English judge saying:5 'Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by usurping his prerogative.' To be sure, it is a judge who speaks.

1. 'Whenever men come together animated by a common purpose, . . a new personality . . . is created.' Cole, Labour in the Commonwealth, 37.

2. 'The real character of corporate personality is suggested by certain facts in the early history of corporations in England. The chief attributes of the corporation, such as perpetual succession, the right to sue and be sued by name, . . were long recognised before the conception of the corporation was thought of. .Their attainment marked stages which corresponded to the developments of social life rather than of juristic thought. . . . So far from the corporation having been the creature of the law, we ought rather to regard it as an entity which has compelled the law to grant it official recognition. Acting as a person has compelled the law to regard it as a person. The function of the State in the matter has been permissive rather than creative. . . . Statute or charter . . . is simply setting an official upon a pre-existing reality.' Brown, Austinian Theory of Law, 261-2. Cf. Forrest, op. cit., 233.

3. To be found in Bosanquet, Theory of the State, 92.

4. For a resume of this cf. Duguit, Law in the Modern State; Dicey, Law and Opinion, passim.

5. Best, C.J., in Duvergier v. Fellows, 5 Bing., 248, 268, quoted in Laski, 'Personality of Associations', op. cit., 406.

But Austin is no better. In scorn he says:[1] 'For a political society which is not independent is a member or constituent parcel of a political society which is. Or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignty committed by sovereigns to subjects.' And Wallace, who was not a lawyer, says,[2] speaking of the state: 'And up to it all subordinated societies ultimately refer; or it finally takes cognisance of all inferior societies, as if they were its delegates and instruments.' Yet 'the life of the state would be intolerable did we recognise only the association which has chosen to accept the forms of law.'[3]

For before this idea of corporate personality, the state has pursued a tortuous course. The idea of the corporation is ancient.[4] The Roman law had developed a cognate concept rather fully. But tho political philosophy has borrowed much from jurisprudence, it failed to take this concept when it would have been exceedingly beneficial. Instead of the idea of incorporation, the idea of partnership was chosen as the legal analogy of the origin of the state. The reason is obscure,[5] but the result has been momentous. For when the metaphysical doctrine of legal supremacy, sovereignty, was developed for the use of the prince, the creation of corporate personality became one of his prerogatives. 'Solus princeps fingit quod in rei veritate non est.'[6] Thus was established the concession theory of corporations, under which modern governments

1. Brown, Austinian Theory of Law, 112.
2. Wallace, op. cit., 262.
3. Laski, 'Personality of Associations', op. cit., 408.
4. Cf. Gierke, op. cit., and Maitland's Introduction thereto.
5. Maitland's Introduction, op. cit., xxiii sqq.
6. Ibid., xxx.

continue to operate. Under it 'the corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust.'[1]

But in this adaptation the orthodox theorists have taken to their bosoms an asp with a deadly sting. For 'when all is said, there seems to be a genus of which State and Corporation are species. They seem to be permanently organised groups of men; they seem to be group units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units.'[2] And if we allow a false individualism to 'dissolve a company into its component shareholders', the process is not likely to stop there. 'The State's possession of a real will is insecure if no other groups may have wills of their own.'[3]

This is the basis on which the critic urges that anarchy is just as near under the monistic state, as it could possibly be under a pluralistic state. They pray for recognition of group-personality, because groups have interests that will not be downed by a fiction.[4] There is a corporate mind; to deny it is futile.

At the same time, care must be taken that the will of the corporation is not separated from that of its members. To do so is to indulge in the same sort of metaphysics we have been criticising. Such a procedure encourages

1. Ibid.

2. Ibid., ix.

3. Ibid., xli-xlii. 'Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no question about the origin of species.' Ibid., ix.

4. Cf. the many historic examples treated by Laski, Problem of Sovereignty.

evil-doing, for it removes all basis of obligation from the society, and furnishes a bulwark for corporate irresponsibility. 'The will upon which our judgment must be expressed is the will that is promulgated and obeyed.'[1] This will we must take to be the will of the corporation, and by it the utility of the corporation shall be judged. Hence, there must always be inquiry into the nature of corporate action, corporate responsibility must be clear at all times, and finally, there must be recognition of the plural character of human personality.[2]

From these three rules, there is deduced the position of the state with regard to the other associations. The state is a corporation also, but it is in some ways unique. In the first place, it is more generalised than the smaller groups. This means that affection for it will be less intense than for the latter. It also means that there will ordinarily be in the state less general capacity for promoting innumerable goods for society. 'The State may, no doubt, have at a given time more intelligence, more prudence, more capacity than such and such an individual; but this superiority is accidental, it does not belong to it of necessity or by its very nature.'[3] The state for its own welfare must confine its operation to those functions demanding its peculiar organisation. This means, in the second place, that the state has the power of coercion, of compulsion, which must be used with great circumspection. Some critics, indeed, deny that this attribute is peculiar to the state, and this is perhaps true if the attribute is defined as the sanction of inflicting penalties other than exclusion from the association.[4] But when the state is ap-

1. Laski, Authority in the Modern State, 278.

2. Ibid.

3. Leroy-Beaulieu, op. cit., 46.

4. 'The general distinction between the "quasi-government" . . . of such associations, -- when neither aided nor oppressed by the state, -- and the government with which we are concerned as students of politics, is, that the former,

proached from the functional point of view, it is seen to have its own peculiar function, 'that of protecting and organising all the other associations, protecting each in the fulfillment of its essential service, co-ordinating them all under its common law, lending to each the aid of its central organisation.'[1] 'The right exercised by the State over . . . societies, is a right of adjustment.'[2] Of course, this means that the state is 'no where necessarily exclusive and a monopolist except in the departments of justice and of police force.'[3] And in these departments it reigns supreme merely because those social functions require such a method of organisation.

In a word, we are faced with the following problem. 'In attending to its own concerns, a local community is, so to speak, a state in miniature. That is, like the state, it has a will to express and execute. If it were possible to assign to the local community its sphere of action, and to the state its sphere of action, each might express and execute its will irrespective of each other.'[4]

The orthodox theorist surrenders before this dilemma. For him 'such a delimitation is impossible. Either the state or the local community must be supreme.'[5] This impasse is the result of a failure to understand the nature of the group and the diversity of human interests. It is the only conclusion they are able to draw from the hypothesis of national sovereignty and

in an orderly community, can inflict no penalty worse than exclusion from the benefits of the association, and perhaps from voluntary relations with its members.' Sidgwick, Elements of Politics, 547. Such a description, however, fits also the 'government with which we are concerned as students of politics.'

1. MacIver, Community, 250.

2. Barker, op. cit., 43, commenting on Green.

3. Woolsey, op. cit., Vol. I., 214.

4. Goodnow, Politics and Administration, 48.

5. Ibid., 48.

the general will.[1] Hence their solution is at best one of territorial devolution. In the words of Goodnow,[2] 'What we need, in order to obtain harmony between the locality and the state, is to grant the locality more legislative power than it now possesses, and to subject it to central administrative control where it is acting as the agent of the state.' This is but a partial solution, for it fails to give proper power to interests other than those of neighborhood. When the critic passes beyond this point, and desires recognition of these other interests, the orthodox theorist accuses the critic of obscurantism, tho in reality he has himself become confused.[3]

The pluralist proceeds from the conviction that economic interests are now dominant, and that they must have political power. Simultaneously, he is aware that to give this power to the state as at present constituted would pervert the social equilibrium, and erect behind the government a cabal of

1. 'The Anglo-American System of local self-government was based on the theory that the will of the state, -- hardly any local will being recognised, -- was to be expressed by state and seldom by local organs; but this will, once expressed, was to be executed by local organs. . .' Ibid., 57.

2. Ibid., 70-1; cf. Adams, op. cit., 61.

3. There follow two examples of this situation. 'The minimisers appear not to distinguish sufficiently the action of the state in general from its centralised action. There are many things which the state cannot do in the way of central government, but which can be done by the action of local governing bodies. But this is a question between the direct and the delegated activity of the state, not between state action and individual enterprise.' Pollock, op. cit., 123. True, this polemic was probably aimed at the advocates of the Polizeistaat, but it evinces a purblindness derived from the same source as that which poisoned that theory. The following is from a more recent writer. 'In 1914 orthodoxy means belief in the State, and heresy takes the form of mild excursions into anarchism. The most recent philosophies. . . are directed towards the vindication of the independence of groups. The modern anarchist, in revolt against an excess of government, does not, like A.Herbert and W.Donisthorpe, preach the principle of Let Be for the benefit of the individual; he preaches it for the benefit of the organised group, and particularly of the organised profession or guild. But it is non-intervention, if in a new form, which is again being inculcated as the rule for the internal policy of the State.' Barker, op. cit., 23. How grossly misconceived is this notion, is, I hope, self-evident, and will become more so as we continue.

vested interests. His solution is therefore functional devolution.[1] 'Tant que l'on ne demandait a l'Etat que de rendre le justice d'assurer la securite a l'interieur et la protection a l'exterieur, le besoin de la decentralisation ne s'est point impose, et les gouvernants detenteurs de la plus grande force, pouvaient remplir seuls ou par leurs agents directs cette mission de justice, de protection, de securite. Mais quand l'homme moderne, ayant pris une conscience nette de l'interdependance sociale liant toutes les membres du groupe, gouvernes et gouvernants, a reconnu a ceux-ci le devoir d'assurer l'execution de besognes diverses dans tous les ordres de l'activite humaine, forcement a du se produire une tendance decentralistrice. Les gouvernants, qui ne sont que detenteurs de la plus grande force, ne peuvent pas eux-memes, ou par leurs agents directs, accomplir ces divers travaux. Ils seront alors necessairement executes par des groupes d'individus, ayany une certaine independance a l'egard des gouvernants et imprimant l'impulsion au service, le dirigeant meme, mais sous le controle et la surveillance des gouvernants et de leurs agents. Cela est precisement decentralisation.'[2] Under such a federalism, the liberty of the individual will be preserved from government aggression, and the needed regulation of social.life will be efficient without being autocratic.[3] 'Le mouvement federalists professionnel supprime donc

1. 'The state must be set free from the impossible task of regulating all the details of industry; it must be liberated for the work that is worthy of the national dignity, and it must leave to those alone who are competent to deal with them, the particular tasks of industrial organisation and management. Devolution is the order of the day, and we must have devolution, not merely by localities, but also by purposes. Even if the state cannot be wholly detached from industry, the problem is to free it as far as possible, and not, as some people seem to think, to concentrate all possible tasks in its hands. No doubt the ultimate power must reside in the democratic state; but it does not at all follow that the state should do all the work.' Cole, World of Labour, 28.

2. Duguit, Le Droit Social, 144-5.

3. 'La forme romaine et regalienne de l'Etat disparaissait pour faire place a un regime politique plus souple, plus humain, plus protecteur de l'individu, et reposant sur deux elements, d'une part la conception du droit objectif ou

l'autorite par une necessite qui lui est intime, par une necessite qui vient de la qualite meme de ses membres: rien n'est plus eloigne du desordre. C'est la competence qui decide, non pas une competence individuelle, c'est la competence de tous. . .'[1] In this synthesis, 'the necessary relation (of these "syndicats") is not a difficult matter of adjustment. It would be necessary, in the first place. to see to it that such a governing body did not pass beyond its powers; that would be in part a matter for the courts and in part, on the permissive side, a matter for some such department as the Board of Trade (in England). . . . In such a fashion, it should not be necessary to go to Parliament at all; tho it would, of course, still be possible to use it as a court of last instance and a depository of grievances.'[2] There would thus be found an organ for real control of the many associations, and the fear of anarchy would be lessened. Speaking of decentralisation par service, Duguit says:[3] 'Un droit de controle effectif, de surveillance constante devra d'ailleurs etre reserve aux gouvernants et a leur agents. D'autre part cette autonomie fonctionnelle devra avoir pour contre-partie une responsabilite, fortement organisee, energiquement sanctionnee, du fonctionnaire a l'egard du public. Le fonctionnaire etant plus protege, plus independant, ayant plus d'initiative, devra etre plus respansable.' Such responsibility will be achieved by a growth of the feeling of social solidarity with its accompaniment of social service, and will be enforced on occasion by the courts of the nation, now

d'une regle sociale, fondee sur le fait de l'interdependance qui unit les membres d'un meme groupe social, regle qui s'impose a tous forts et faibles, grands et petits, gouvernants et gouvernes, -- et d'autre par la decentralisation ou le federalisme syndicaliste.' Ibid., 41.

1. Leroy, op. cit., 275.

2. Laski, 'Problem of Administrative Areas', op. cit., 37-8.

3. Duguit, Le Droit Social, 146-7.

divested of the cloak of the dogma of national sovereignty. Such is the solution offered; it is a solution unperceived by the orthodox theorist, but one which is emerging by a gradual process of evolution from the ancient regal conception.[1] 'C'est dans une telle organisation que peut se realiser la concordance entre les libertes notee par Rousseau: "Les engagements qui nous lient au corps social ne sont obligatoires que parce qu'ils sont mutuels et leur nature est telle qu'en les remplissant on ne peut travailler pour autrui sans travailler aussi pour soi.'[2]

C. The Province of Law.

It is evident that the judiciary will play an important part in this new society. The jurists 'occuperont meme une place preeminente, charges de determiner les fonctions et les devoirs de chaque individu et de chaque classe, charges d'affirmer . . . que nul n'a d'autre droit que celui de faire son devoir.'[3] 'The Courts will find a new and important function thrust upon them. They will continually be asked to adjudicate between State-claim and the demand of the group, with the reawakened knowledge that into the problem of sovereignty there enter certain ethical elements which are vital to a right judgment. They will, therefore, admit that the authority of the State is not of necessity paramount because it cannot seldom be wrong, and is not always obeyed.'[4] 'Disputes between the Guilds would be fought out in open court, as at present. And the judgments of the courts would be compulsory, as now.'[5]

1. 'Ils n'ont point vu que le syndicalisme fonctionnaire n'etait point une cause, mais un effet, que c'etait parce que l'on ne croyait plus a la fiction de la souverainete etatique que se produisait l'evolution vers la decentralisation par services publics.' Ibid., 150.

2. Leroy, op. cit., 274.

3. Duguit, Le Droit Social', op. cit., 157.

4. Laski, 'Notes on Ecclesiastical Trusts', op. cit., 206.

5. de Maeztu, op. cit., 122.

With such unanimity of agreement on the part of the critic, it becomes important to guage the probability of the competence of the theory of law, in the face of such a development. Let it be noted at the start that there is today much dissatisfaction with the theory and the practice of law. There is an outcry against the courts, against legislators, and against lawyers. There is something the matter; it is our purpose to see whether it is at all the fault of our legal institutions.

Pound finds three causes for the increasing discrepancy between 'law in books' and 'law in action'. These are: (1) defects in the administrative machinery of the courts; (2) the backwardness of the art of legislation; and (3) the discord between habits of juristic thinking and current social, economic and philosophical thinking.[1] We shall consider these in sequence.

The defect in machinery is a minor problem, to be solved thru institutional changes after the new order has come. The important thing here to note is the growth of administrative law,[2] and its application by the ordinary courts. In administrative law problems arise which are novel in jurisprudence and there has been increasing discontent at the bungling jurisdiction of the 'judicial courts'. It is a phase of law which bids fair to increase rapidly in proportion with the increase of public business. It is an inevitable result of the increasing duties of government,[3] and in so far as the political organ attempts to control the syndicats and the associations, this administrative law will expand. In reaction to this, there has come a tendency to vest in officers of the government other than the strictly judicial, the determination of such disputes. Dicey has noted the 'temptation, and often the necess

1. Pound, 'Law in Books and Law in Action', in American Law Review, Vol. XLIV, 24.

2. Cf. Duguit, Law in the Modern State, passim.

3. Dicey, Law of the Constitution, xxxviii, sqq.

sity, of extending the discretionary powers of officials.'[1] For him 'such transference of authority saps the foundations of that rule of law which has been for generations a leading feature of the English Constitution.'[2] Yet such a development will continue, for as Dicey admits,[3] 'the management of business is not the same thing as the conduct of a trial. The two things must in many respects be governed by totally different rules.'

Thus we may venture to prophesy an increase in special courts, such as the Court of Claims, the Commerce Court, and the French administrative courts. Special interests demand special modes of adjudication, modes that we cannot expect the ordinary courts or the ordinary judges to employ.[4] The machinery of the judicial system will thus be greatly modified, to correlate it with the novelties of public service.

(2) 'Juristically, we are in a period of stability and the growing point of law is in legislation.'[5] Never has there been such a plethora of laws on the statute-books; never have the legislative annuals been so bulky as now. 'But legislation has always brought with it an imperative theory of law, a theory that law was the command of the sovereign and a resulting tendency to overlook the necessity of squaring the rules upon the statute-book with the demands of human reason and the exigencies of human conduct.'[6] Legislation

1. Ibid., xxxix.

2. Dicey, 'Development of Administrative Law in England', in Law Quarterly Review, Vol. XXXI, 150.

3. Ibid.

4. 'A Government department when it exercises judicial or quasi-judicial jurisdiction under a statute is bound to act with judicial fairness and equity, but is not bound in any way to follow the rules of procedure which prevail in Englisg courts.' (1915, Local Government Board v. Arlidge, A.C., 120, 84 L.J.K.B., 72) quoted in ibid., 149.

5. Pound, 'Law in Books and Law in Action', op. cit., 23.

6. Ibid.

is out of touch with the times because it tries to do more than it can. 'It is too rigid, attempts too much detail and fails to leave enough margin for judicial action in individual cases.'[1] 'The legislator, by nature vain and presumptuous, must be restored to a sense of modesty. He does not create right; he only regulates the exercise thereof. He has absolutely no creative power. He only wields a regulating force, and this unfortunately is transformed in his reckless and unskilled hands into an immense power of perturbation. Absolute faith in the power of reason is one of the most fatal of the many superstitions which the eighteenth century has bequeathed to us.'[2] The legislator needs to rid himself of the notion of popular sovereignty and of the correlative doctrine of the general will, and to study sociology and psychology. He must prepare for his duties, and study the means of making legal rules effective. 'There is', said Bentham more than a century ago,[3] 'or rather, there ought to be, a logic of the will. . . . Of this . . . the science of law, considered in respect of its form is the most considerable branch. . . . It is, to the art of legislation, what the science of anatomy is to the art of medicine. . . . Nor is the body politic less in danger from a want of acquaintance with the one science than the body natural from ignorance in the other.' 'Twas sage advice, given under the handicap of insufficient knowledge of human nature. It is still quite pertinent.[4]

1. Ibid., 24.

2. Leroy-Beaulieu, op. cit., 193.

3. Bentham, op. cit., xiii.

4. Bosanquet is unable to afford any constructive light upon this problem. For him conservatism is plenty. 'Liberty . . . does not depend on the absence of legislation, but on the comprehensiveness and the reasonableness of life. . . . It is not weakness of the public power, but its adaptation on which freedom depends. What we have therefore to do, is not to trouble ourselves about the more or less of legislative interference; but, living out our lives in some particular honest endeavor, and making those general arrangements which spring out of obvious felt necessities, to call in the social power whenever and wherever good cannot be done without it, and can be done with its help.' Civilization of Christendom, 379-80. Behind this is the old bogie of the omnipotent beneficent sovereign, and a truncated individual.

(3) In periods of juristic stability, such as the present, 'the desire for formal perfection seizes upon jurists. Justice in concrete causes ceases to be their aim. . . . Such periods have produced in the past spurious interpretation and courts of equity. In the present such a period is giving rise to a practice of equitable application as a means of asserting the element of discretion, of reason, of equity in its moder sense, inherent in all law.'[1] 'Law is a condition of politics rather than its end,'[2] and the vague realisation that this truth has been obscured has led modern jurists to hark back to the purpose of law, and to administer it in the sense Montesquieu indicated in his famous definition. 'Laws, in the most extended signification of the word, are the necessary relations which spring out of the nature of things.'[3] It is with this standard that the sociological jurists are building a new jurisprudence to fitthe facts of modern social life.

In this jurisprudence the lawyers and the pluralists are co-operating. Pound has done a monumental piece of historic analysis to give a basis for the new theory, while the critic has urged a similar conception from the point of view of administrative psychology.

The historic analysis shows how 'political theory sought to explain the duties of rulers and governments by a Romanist juristic theory of contract.'[4] In the eighteenth century there emerged the natural rights of man deduced from a social compact resting upon individuals rather than upon their relation to things. This contractual basis remained thruout the nineteenth century; 'jurists thought of individuals and contracts rather than of groups and relations.

1. Pound, 'Law in Books and Law in Action', op. cit., 23.

2. Bluntschli, op. cit., 298.

3. Adopted by Leroy-Beaulieu, op. cit., 193.

4. Pound, 'End of Law as Developed in Juristic Thought', in Harvard Law Review, Vol. XXX, 216.

The conception of the abstract individual ruled in legal philosophy.'[1] 'Austin grafted a Romanist analysis, learned in Germany, upon the political ideas of Hobbes, and the ethical ideas of Bentham. Maine's interpretation of legal history was derived from the phenomena of Roman law considered from the standpoint of Savigny. Thus both of the schools of Anglo-American jurists were Romanised. The Romanist idea of a legal transaction, which the nineteenth century sought to apply to all possible situations, was regarded as the institution of the maturity of the law. But the conception of the legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not wholly lose for us the contribution of the feudal law to our legal tradition. If we cast aside the Romanist prejudices of the nineteenth century historical school, we may perceive that in the idea of relation, in the characteristic common-law mode of treating legal problems which we derived from the analogy of the incidents of feudal tenure, we have an institution of capital importance for the law of the future, a means of making our received legal tradition a living force for justice in the society of today and of tomorrow.'[2]

Thru the concept of the jural principle, the French school reaches similar conclusions. Duguit formulates this principle as follows:[3] Do nothing which can possibly infringe upon social interdependence, either thru similitude or thru division of labor; do all that is within your power, <u>within your given</u>

1. <u>Ibid</u>., 218. 'The mediaeval gilds were gone and the legal position of trade unions and a legal theory of collective bargaining had not yet become problems for the lawyer. Hence the nineteenth century lawyer thought ill of anything that had the look of the archaic institution of status. The Romanist idea of contract became the popular juristic instrument.' <u>Ibid</u>.

2. <u>Ibid</u>., 220-1.

3. Duguit, 'Law and the State', in <u>Harvard Law Review</u>, Vol. XXXI, 178; the underscoring is mine.

situation and within your aptitudes, to insure and increase social interdependence, both by similitude and by division of labor.' In Duguit's system, there are no subjective rights; everyone is subject to the jural principle by the application of which 'all individual wills -- the will of those who govern as well as the wills of those who are governed -- find themselves placed in a certain situation which we call an objective or legal situation, implying in a general way the obligation upon everyone to co-operate according to his position in the maintenance of social solidarity. . .'[1] Thus the jurists and the critics reach the conclusion that rights depend upon the relation of men to groups, to functions, and that 'the external regulation of this relation is the law.'[2]

This new theory of legal obligation is a deduction from socio-psychological observation. The old theory that freedom consists in being bound by law, is rejected. 'Freedom is essentially something which is realised by and in the individuals composing the Commonwealth, and not in the omnipotence of institutions over the individual.'[3] It comes from a recognition that 'all society is a discipline; and since man cannot live without society, he can live only in accord with this discipline.'[4] This discipline is la regle sociale which is different with different countries and different times, but possesses a sanction of its own which is compelling[5] because 'it results from the existence in men's minds of a sense of responsibility to each other which is projected be-

1. Ibid., 182-3.

2. de Maeztu, op. cit., 251. 'Ainsi sur le fondement de l'elimination des droits subjectifs se constitue un nouveau regime politique et social.' Duguit, Le Droit Social, 13. Cf., supra, Section A.

3. Cole, Labour in the Commonwealth, 199.

4. Duguit, Le Droit Social, 7.

5. Ibid., 6-7.

yond all the objects for which the political state is conceived as existing.'[1]

Under this system, there is a legal basis for state liability. The state comes to regard itself as a huge public service corporation,[2] and it is liable even as any other corporation. The individualistic notions of common-law negligence will here also be supplanted by the recent development which recognises the current industrial situation.[3]

Moreover, there will be less need for legislation strictly so-called. With the operation of the jural principle, and the growing sense of social solidarity, there will rise institutions of conservation as well as institutions of progress, conventions between groups within society which will determine extra-legally the status of the members in their external relations.[4]

But there will remain the necessity for a supreme arbiter. For tho in any given dispute the stronger may conquer as a matter of fact, with the growth

1. Kidd, op. cit., 370,

2. Cf. Duguit, Law in the Modern State, passim.

3. Dicey has recognised this, but thinks it a dangerous novelty. 'It ought to be noted', he says, 'that this extension of the liability of the State must in practice be a new protection for officials; for if the State admits its own liability to pay compensation for damages suffered by individuals thru the conduct of the State's servants, this admission must induce persons who have suffered wrong to forego any remedy thay may have possessed against, say, a postman personally, and enforce their claim not against the immediate wrong-doer, but against the State itself.' Law of the Constitution, xlvi. This danger is unreal; for there will undoubtedly occur the development that has taken place in French law, where a distinction is made between faults of the servant and faults of the service; only for the latter can the state be held. Cf. Duguit, Law in the Modern State, passim.

4. 'C'est a mon avis une grande erreur de croire que le progres social se mesure au nombre des lois nouvelles qu'edictent les gouvernants. D'ailleurs dans un avenir, qui n'est peut-etre pas eloigne, les gouvernants feront de moins en moins de lois, parce que les rapports des individus et des groupes seront surtout regis par des reglements conventionnels, je vuex dire par des reglements resultant d'une entente entre deux ou plusieurs groupes, les gouvernants ne devant intervenir que pour leur donner une sanction, les controler et les surveiller.' Duguit, Le Droit Social, 56-7.

of the new conception and the intensity of its acceptance, arbitration and judicial decision will supplant force. This is why Duguit asks for 'a high tribunal, composed of representatives of every social class, which shall judge . . . of the legality of laws'[1] and determine jurisdictional disputes.

D. Basis of Representation.

'It is important to remember that federalism has not, in general, resulted in lessening the pressure of business upon the central authority. . . . The division of powers has certainly the result of lessening the number of subjects upon which the federal government must concentrate its attention; but the difference in extent of purview seems more than compensated by the increase of intensity.'[2] Hence, the problem before the critic is 'to invent machinery, . . . by which such federal citizenship can be made workable.'[3]

The critic uses the word 'invent' with malice aforethought; for it appears to him that the representative system has broken down. 'The fundamental hypothesis of government in a representative system is that it is government by discussion.'[4] Yet 'in whatever analysis is made of the modern representative system, two facts stand out with striking clarity. On the one hand, it is obvious that there is no deliberative assembly that is not utterly overwhelmed by the multiplicity of its business; on the other hand, it is at least equally clear that the average elector except in times of crisis or abnormal excitement, is but partially interested in the political process.'[5] From the

1. Quoted in de Maeztu, op. cit., 220.

2. Laski, 'Problem of Administrative Areas', op.cit., 24.

3. Lippmann, 'A Clue', in New Republic, Vol. X., 316-7.

4. Laski, 'Problem of Administrative Areas', op. cit., 10.

5. Ibid., 11-12. 'Nothing is more fatal to the working of democratic government than a permanent divorce between the process of politics and the life that is led by the mass of men. . . . That does not imply rotation in office. Rather does it imply the perpetual and widespread discussion of men and measures.

first, there comes the problem of securing better representatives in a more favorable environment; from the second, the problem of public opinion.

The pluralist tries to solve both. in a degree, by one institutional change. He turns back to the delimitation of function between associations, and finds that the state 'as a territorial association . . . is clearly marked out as the instrument for the execution of those purposes which men have in common by reason of neighborhood.'[1] Therefore, since 'representative institutions represent, not men and women, but particular purposes which men and women have in common,'[2] 'Where localities have built, for the furtherance of a specific common interest, a central association that central association should be no longer organised according to local divisions, but according to the intrinsic divisions of the specific interest concerned.'[3]

This clearly points to a new basis of representation, functional rather than territorial. It is the contention of the critic that such a basis should be legally recognised, rather than as now, subconsciously tolerated. That legislatures, for instance, have grown to represent interests rather than the people, qua people, is a commonplace that can de avoided only be conservative rejection of significant facts.[4] But, being territorially based, the present system leads to a disparity between the life the individual leads, and the

the ceaseless instruction of the public mind . . . . It means the continuous existence of an urgent public opinion.' Ibid., 14.

1. Cole, Self-Government in Industry, 126.

2. Cole, Labour in the Commonwealth, 207.

3. MacIver, Community, 258.

4. Cf. the very interesting analysis made many years ago by Spencer: 'While the upper house is the product of that ancient regime of compulsory co-operation the spirit of which it still manifests, . . the lower house is the product of that modern regime of voluntary co-operation which is replacing it.' Op. cit., 439. This separation Spencer credits to the growth of industrialism and local groups, and to the principle that difference of function entails differentiation of parts.

legal method by which the rules of that life are governed. 'It is here that the mechanisms of modern democracy seem most inadequate. For we have not sufficiently related the areas they traverse to the occupations of the average man. . . . We are suffering from an over-centralisation which results from placing too great an emphasis upon the geographical factor in government.'[1] The critic would remedy this, on the following analysis:[2] 'It is certain that the extra-domestic interests of the average man are centered primarily in the activities of his occupational group, and that his territorial or local loyalty is constantly on the decrease. The idea of territorial representation is a heritage from the agricultural or municipal society of the past, when interest in one's locality meant the same thing as interest in his occupation.' Today we are beyond the handicraft system.

This does not mean that all territorial representation is necessarily to be abandoned. There are certain interests which may well be represented by neighborhood. This, for the pluralist, seems especially true for the interest of the consumer.[3] Such an interest seems to him to be based upon locality; hence the present system should be retained to represent those interests, and a complementary body, or bodies, should be erected to represent by function, other interests, and especially that of the producer.[4]

1. Laski, 'Problem of Administrative Areas', op. cit., 16. 'Localities do not stand for specific interests, being areas of community which circumscribe only a very limited, and, with the extension of community, less and less definite exclusiveness of social type and interest. It is in very great measure the mere convenience of contiguity . . . which makes the locality an effective social unit. But in the central association the convenience no longer counts, and here organisation by local divisions is, except under special circumstances, a mere impediment to the activity of the association.' MacIver, Community, 258.

2. Barnes, 'Durkheim's Political Theory', in Political Science Quarterly, Vol. XXXV, 249.

3. Cf. Cole, Labour in the Commonwealth, passim.

4. 'What is wanted in professional representation is not either an addition, on that basis, to the House of Commons, or a similar reconstruction of the House of Lords.' The geographical basis has a real value for certain types

This solution would aid the quality of legislation, for it would force into the light the real purpose of representation, and hence give solid ground for discussion. 'Legislation reflects the minds that make it. . .'[1] Thru a system of functional representation the character of those minds should be more open to inspection by an alert public opinion; while the legislator himself is to be aware that his personal interest coincides with that of his constituents. Therefore, legislation will be brought forth in a more favorable environment.

E. Administration.

The final problem of the new synthesis is that of administration. We have found that public power must be based on an objective right for public service, that the value of this service must be judged pragmatically; that institutions of government are good in so far and only so far as they give outlet to human nature. This requires a study of that nature, both within and without institutions; it is found that social groupings other than the state are natural and innumerable, and that they are based upon functions for the individual-social welfare. Institutions should then be so based in law; but this means a division of power according to some federal system. But this is a problem of administrative mechanism; how best to effectuate thru institutions the whole of every man.

The importance of administration has grown with the advance of civilisation. 'As government develops in a state another kind of development is also going forward. When we compare the primitive with the more advanced

of problems, particularly those in which the interest of the consumers is dominantly concerned; and it would result in mere confusion to connect it with a producers' interest which is concerned with very different problems.' Laski, 'Problem of Administrative Areas', op. cit., 37. * This is the suggestion of Wallas; cf. Great Society, passim.

1. Laski, 'Problem of Administrative Areas', op. cit., 32.

condition of society, we see that they differ not merely in government, but more generally in what we may call specialisation. In property, in industry, in occupations and pursuits, society becomes more diversified. . . . This development is not in itself strictly political, and yet it continually raises new political problems. For at any stage the question may arise: This new thing that has appeared in the state, to which of the two provinces shall it belong, -- to the province of liberty, or to that of government?'[1] The phraseology is mid-Victorian, but the problem is indicated.

'Administration', says Adams,[2] 'is the capacity of co-ordinating many, and often conflicting, social agencies in a single organism, so adroitly that they shall operate as a unity. This presupposes the power of recognising a series of relations between numerous special interests, with all of which no single man can be intimately acquainted. Probably no very highly specialised class can be strong in this intellectual quality because of the intellectual isolation incident to specialisation; and yet administration or generalisation is not only the faculty upon which social stability rests, but is, possibly, the highest faculty of the human mind.'

It is just because the orthodox theorists failed to understand the nature of this problem that the administrative machinery of the monistic state has broken down. For in a day when specialisation is dominant, the theorists have insisted that one organ of a general nature could handle all the administrative problems. A false uniformity has been the assumption behind much of democratic government. Thru the facets of the doctrine of sovereignty, equality has come to mean for them identity; the result has been a befuddled discrimination in favor of a static ideal of man, and a near-sighted and often culpable inter-

1. Seeley, op. cit., 139-40.

2. Adams, op. cit., 207.

ference with liberty, with progressive initiative.[1]

With a functional interpretation of the province of government, a new light is shed upon the problem. Under it interests acquire recognition. This means that there is a distribution of power.[2] As Laski puts it,[3] there is 'a law of diminishing returns' regarding the sphere of government. The specialised men cannot represent general interests as infinitum;[4] in an attempt to do so there will be created an irresponsible clique of governors. The administration will inevitably tend to hide behind the cloak of sovereignty, and refuse to recognise weaknesses in its governance.[5] But this is an intolerable situation, meaning inefficiency and corruption in service. The critic offers two means of remedy, decentralisation by function and administrative responsibility.

With the multiplication of social interests requiring regulation, 'it becomes more and more obvious that we must recognise certain natural units of political administration, and also see to it that we do not duplicate that power. It is freely admitted that the result will probably derogate from the unique sovereignty of the whole. Yet that is surely but a theoretical derogation from which no practical consequences ensue. . .'[6] Hence, whether it be

1. 'When the State consisted entirely of a handful of officials and privileged landowners, . . an increase of its administrative activity meant the extension of interference by this limited class with the daily lives of the vast masses of men whom it governed. Moreover, it was an interference which, however good its motives, almost inevitably suffered from a want of detailed knowledge of the circumstances of those whom it was supposed to benefit. But today. . .' Jenks, Short History of Politics, 146-7.

2. 'The study of administration is closely connected with the study of the proper distribution of constitutional authority. . .' Wilson, 'The Study of Administration', in Political Science Quarterly. Vol. II, 213.

3. Laski, Problem of Sovereignty, 277; cf., ibid., Appendix B.

4. Cf. Adams, op. cit., 3-4, 207 sqq.

5. Cf. Duguit, Law in the Modern State, passim, for criticism and examples.

6. Laski, Problem of Sovereignty, 284.

a coalescence of separate groups, or decentralisation from a previously complete unity, the problem is one of administration.[1] Give power where there is a function to be expressed; in this way will the sovereign power be restrained by division,[2] and the instinct of craftmanship be liberated.

And within these decentralised groups of functions, the functionaries are to have a character of public servant not really given to the agents of the regal sovereign state. For the orthodox theorist these agents were 'mouthpieces'. 'While so officiating, these persons gave expression and execution to no will of their own, but purely and simply to the will of the State. Therefore, governmental agents acting in conformity to law are passive agents, mere organs.'[3] For the critic the agent is no such metaphysical being.[4] His will is not dichotomised that the irresponsibility of the sovereign state may remain intact. The act of an administrator is in no way different from any other individual act.[5] 'Ce sont de simples actes d'execution, desquels il n'y a point a rechercher le caractere juridique. . . . La distinction des gouvernants et des gouvernes dans un pays est un fait de plus grande force. Les gouvernants sont ceux qui monopolisent la force. . . . Mais cela ne donne point a l'acte qui est fait un caractere juridique special. L'acte est purement material; c'est une force qui brise une autre force; ce n'est point une volonte qui pre-

1. Laski, 'Problem of Administrative Areas', op. cit., 25.

2. Cf. Acton, op.cit., 98.

3. Willoughby, Nature of the State, 139.

4. 'Les fonctionnaires sont tous les individus associes directement et d'une maniere permanente et normal au fonctionnement d'un service public, et qu'un service public est une certaine activite, l'accomplissement d'une certaine besogne qui a un moment donne est consideree comme etant d'une importance telle pour le groupement social que c'est un devoir juridique pour les gouvernants d'en assurer l'accomplissement.' Duguit, Le Droit Social, 138.

5. 'L'acte administratif est un acte emane d'une volonte particuliere, et il ne peut produire d'effet que dans la mesure ou il est conforme a la regle de droit.' Ibid., 74.

tend s'imposer a une autre volonte en vertu d'un pouvoir juridique propre.'[1] Power is hence not to be justified by its possession; the agent is subject to the same jural principle which runs thruout society; in accordance with their special position they are legally obliged to refrain and to act.[2]

In such a fashion will the critic secure efficiency without the evils of bureaucracy.[3] He has recognised that 'to the administrative function falls whatever share of progressive activity may inhere in government,'[4] and has attempted to ensure the democratic operation of this necessary arm of power. So ends the last claim of the monistic state to continued existence; it is no longer necessary that there be a centralised sovereign organ in order to attain needed and adequate social regulation. 'L'autorite tombera parce qu'elle est attaquee par le force irresistible de la competence. Ainsi s'oppose a la hierarchie unilaterale et a l'ordre regalien la competence et le contrat des fonctionnaires associes. . .'[5]

F. Conclusion.

'If democracy were confined to an exclusive choice between an indivisible

1. Ibid., 79.

2. 'Les gouvernants sont des individus comme les autres et non point les organes d'une pretendue personne collective. Comme les autres, ils sont soumis a la regle de droit, qui leur impose les obligations correspondantes a la situation qu'ils occupent dans la societe et qui par consequent les oblige a mettre la plus grande force qu'ils detiennent au service de l'interdependance sociale. ils ne sont pas seulement tenus de s'abstenir; ils sont tenus d'agir, et cette obligation se traduit dans le devoir juridique d'enseignement, de garantie de travail.' Ibid., 65.

3. 'It is easy to cry down a bureaucracy; none the less it is indispensable; and they are none the less foolish . . . who demand at one and the same time the extension of the State's prerogatives and suppression . . . of the bureaucracy.' Leroy-Beaulieu, op. cit., 134. For solution he goes to the example of the voluntary association, such as the joint-stock company, wherein the 'bureaucracy' is 'at once more prompt, and more agile than that of the State.'

4. Todd, op. cit., 342.

5. Leroy, op. cit., 265.

state and a dismembered society, I would,' says Croly,[1] 'accept the former as the alternative which probably would allow a larger measure of human development. But it is not confined to such a choice, and if it were the moral authority of the state could never be anything more than the glorified and falsified incarnation of successful force.'

'No one denies that, however we construct the state, some form of organising power will be necessary. What is coming more and more to be denied is the belief that . . . power must be clothed in oligarchic garb.'[2] This is a false and unnecessary deduction from the demand for social order. 'As soon as we try to found order on the omnipotence of authority, instead of deriving authority from the necessity for order, the result is disorder, because society abandons itself unconditionnally to the ambition of individuals who assume the privileges of authority. And as ambition is in essence unlimited. it will not be satisfied with anything less than the world for a kingdom.'[3]

Such is the strict logic of the authoritarian theorists; and such was in large measure the situation of civilised Europe two centuries ago. It is not so evident today because of institutional growths. But his is not to say that the danger does not remain. The state is no longer omnipotent in fact, but merely because other associations have arisen within society that challenge its supremacy, and not because the state has surrendered its legal position. And not only are many of these associations based on the same theory as that of the orthodox political science, but their presence and power poisón the core of political society. The state has refrained from overcoming these associations, not solely because it was afraid to chance the struggle, but also

1. Croly, 'Future of the State', op. cit., 183.
2. Laski, 'Problem of Administrative Areas', op. cit., 60.
3. de Maeztu, op. cit., 102.

because these associations have in large degree conquered the state and utilise it for their purposes.

The condition is menacing; a new theory must afford the ground for reconstruction. This theory is not to be found in state - socialism. To absorb all the interests of men into the state-concept would but aggravte the evil. The mechanism of the state will not stand such an increase of function. Any institution bears within it the seeds of decay; as the institution crystallises it loses touch with the end of its creation. It becomes a dead thing, without the power of self-propulsion, and lies ready for the manipulation of special interests. Private initiative must reamin as unfettered as possible. But 'the essence of socialism consists in despoiling the individual of part of the functions which naturally belong to him in order to confer them upon the State.'[1]

Nor is the answer to be found in a refusal to recognise the existence of these ulterior associations. They exist, and their is no way of ignoring them; to do so would be to continue the old system of confusion and irresponsibility to society. For these associations have a legitimate purpose; they exist to supply services to people. They cannot be slighted, nor can they be suppressed. They are spontaneous, and inherent in the nature of the socio-individual human being.

'We are, therefore, presented with a quasi-federal system; that is to say that large functions are left by the state to settle their own problems. But, on the one hand, no real effort has been made to relate that economic federalism to the categories of the political structure, and on the other, within each function there is no adequate representative system.'[2] These are the two major

1. Leroy-Beaulieu, op. cit., 158.

2. Laski, 'Problem of Administrative Areas', op. cit., 55.

problems which the critic tries to face and answer. He premises the reality of the individual as an end for himself; he is convinced of the value of social groups as a means of expression for that individual; andhe recognises that a complex civilisation demands a multitude of regulatory mechanisms.

He has suggested many concrete systems, which it is not our purpose to describe;[1] but in them all there is the element of decentralisation or devolution or federation, a deduction which follows rigorously from his scientific postulates.[2]

1. The following is a summary of Duguit's synthesis: 'The governors, representing the effective majority of individuals composing the social group; for these, not the right of public power, but the duty of employing the supreme force for the realisation of right in the largest sense, their action reducing itself for the accomplishment of technical activities to the role of surveillance and of control. In the society, syndicalist groupings, strongly integrated, federated by professions and having political representation assuring a strong limitation upon the governors. The class struggle ended, or at least mitigated, by the establishment conventionnel of regulations determining the relations of the classes and inspired by a conscience nette of their independence. The public service executed and directed by corporations of functionaries, responsible for theirfausses a l'egard des particuliers and placed under the control and surveillance of the governors.' Literal translation of Duguit, Le Droit Social, 154-5.

2. Laski, discussing the solution of the Guild-Socialists, says: 'Such a hierarchical structure . . . is little less than the creation of a state. It brings the whole process of production face to face with the whole process of consumption; for the latter, dominantly an interest of territorial juxtaposition, is the underlying implication of our parliamentary structure. . . . We have so naturally regarded the state as the representative of society as a whole that our own erection of an authority which is in a position to challenge the uniqueness of that claim comes with something of a shock. Yet it is nothing less that is involved in the logical outcome of our present tendencies.' 'Problem of Administrative Areas', op. cit., 46. This idea of the Guild-Socialists is not a product of the twentieth century. The Guildsmen themselves once pointed to the gilds of the Middle Ages as a prototype; tho more recently they have, because of the many dissimilarities, lessened this emphasis. But the idea was latent in Fabianism, (cf. Barker, op. cit., 218) and Sidgwick has the following interesting passage, published in 1891. He is speaking of what he terms 'Sectional' government. 'I use this term to denote the cases in which governmental functions are exercised . . . by bodies (or individuals) partially independent of the ordinary executive . . . over portions of the community defined not by local habitation but by some other characteristic. It is quite conceivable that subordinate governmental functions should be largely distributed on this plan. A civilised community is naturally divisible, otherwise than locally, into classes that have to some extent common class-interests. . . . They are interests of the producers of some commodity as distinct from those of the consumers ... .' Elements of Politics, 503-4.

'As to the relation of the various national occupational organisations to the state, the general principle would be that the government should formulate the basic rules for . . . regulation and delegate to the occupational group the function of diversification and applying them to the particular needs of the individual (group). This function of proper diversification and specialisation of . . . regulation, which the state cannot perform, is the vital soul of the occupational group. This arrangement thus provides for the best employment of the activity of the state and the subordinate corporation. The former can impart the necessary uniformity and stability to the system, while the latter can supply the equally essential need of plasticity, specialised knowledge and sympathetic interest in its task.'[1]

There are criticisms to be aimed against any such synthesis. The problem of delimitation of function cannot be solved in such an off-hand fashion as is taken by most critics. The theory of law they advance needs much clarification. The nature of loyalty requires more analysis, for we have been accustomed to believe that allegiance must be unqualified.[2] The groups are likely to develop corporate exclusiveness, or to attempt to use their power to strain the 'balanced interplay of functions'.[3] These are but a few of the obvious objections.

But the customary criticisms offered by the supporters of the old order

1. Barnes, 'Political Theory of Durkheim', op. cit., 247-8.

2. 'Not only do lack of time, energy, information, narrow the effectiveness of citizenship, there is also, I suspect, a deeper difficulty in our own psychological constitutions. Emotionally we are not at ease when the source of authority is distributed. A divided will is likely to be an inefficient one, That is why instinctively every association into which we are grouped tends so rigorously to insist on unqualified allegiance. . . . There will have to be analysis of the personal response to such a pluralism.' Lippmann, 'A Clue', op. cit., 317.

3. Soule, 'National Guilds and the State', in Nation, Vol. CXI, 73.

are not so searching. When Brown, for instance, says that 'M.Duguit professes an allegiance to facts; in reality he is obsessed by some facts to the exclusion of others. The power of the modern state in its sovereign organisation is a fact. The unity of the modern state, and even the organic character of that unity, are facts,'[1] it is no answer, but mere fulmination based on the antiquated legal theory.

Barker's criticism is just as opaque. 'In truth,' he says,[2] 'any doctrine of separation of powers, such as Gild-socialism advocates, is bound to collapse before the simple fact of the vital interdependence of all the activities of the "great society" of today. The State is one body: no clever essay in dichotomy can get away from that fact. . . . Either the State must go, as syndicalists seem to advocate, and that means chaos, or the State must remain, -- and then, if you are to have socialism, it must be State-socialism.' This is simply due to failure to understand the plain statements of the critics, for there is nothing upon which such men as Laski and Duguit place more emphasis than the 'vital interdependence of all the activities of the "great society"'.

Sabine says[3] that 'the chief objection to Mr. Laski's views, for English and American purposes at least, is that they are out of accord with the almost instinctive distrust of Anglo-Saxons for political groupings along lines of social cleavage.' This criticism is more respectable, and merits a word of consideration. Laski would answer that classes exist, and to ignore them is to endanger the essential unity of purpose in society. Only by recognition of diverse interests and by giving them a legal station in society can they be

1. Brown, 'The Jurisprudence of M.Duguit', op. cit., 176. This article is the best and the most complete attempt to combat the theories of the French critics, that I have discovered.

2. Barker, op. cit., 229.

3. Sabine, 'Authority in the Modern State', in Philosophical Review, Vol. XXIX, 282.

made beneficent. To deny their existence is a step on the road to civic strife. They are legitimate, apparently inevitable so long as men insist upon having opinions and interests; what is needed is to canalise them to function for the social good. Sabine, moreover, overlooks the fact that every man will belong to varous societies, and that his allegiance will waver between them in accord with their respective moral achievements. Thus the social cleavage will not be between men, but between ideas. This in itself is a process of education, and education will lessen the chances of disruption. 'La discussion atteindra l'Etat, en cherchant a donner un caractere contractuel a tous les rapports entre fonctionnaires superieurs et inferieurs; les associations et syndicats de fonctionnaires attaqueront d'abord ce que l'on appelle la hierarchie. Cette consequence de donner un caractere contractuel a des rapports que l'Etat veut maintenir unilateraux; c'est un fait deja visible.'[1]

It is this very absence of 'discussion', of a popular will able effectively to criticise the administration of government, that is the cause of the badness of the state today. But the state which the critic envisions will not be a centralised bureaucracy hidden from the scrutiny of the people; it will rather be an alert and flexible instrument for the service of general interests. 'New methods of government will be evolved, and, instead of the abstract democracy of the ballot-box, there will be a real democracy aiming not at increasing continually the absoluteness of its control, but at delegating functions to self-governing bodies within itself, and also harmonising their activities with the good of the whole. Parliamentary devolution by means of the committee-system, administrative devolution by granting wider powers to local and ad hoc authorities, and industrial devolution, making Trade Unions a self-governing producing unit, will go hand in hand. . . .'[2]

1. Lemoy, op. cit., 245.

2. Cole, World of Labour, 421-2.

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